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in the

Supreme Court of the United States

October Term, 1976

No. 76-629

C. CAREY MATTHEWS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner prays that a Writ of Certiorari issue to review a part of the Judgment and Decision of the United States Court of Appeals, for the Fifth Circuit, entered on the 9th day of June, 1976, which reversed and remanded an Order and Judgment of the United States District Court for the Southern District of Florida, of August 5, 1975, denying the amended Motion of Petitioner to set aside guilty plea, adjudication and sentence under 28 USC §2255, without an

evidentiary hearing. Petitioner claims as fundamental error and clearly erroneous that portion of the Order and Judgment of the Fifth Circuit Court of Appeals which found without merit and rejected assertions of error by the Petitioner in that his *Alford* plea was accepted by the trial Court in this case (also the United States District Court for the Southern District of Florida), without a sufficient factual basis.

If the Fifth Circuit Court of Appeals had recognized the constitutional merit and worth of Petitioner's claim that his *Alford* plea was accepted by the trial Court without a sufficient factual basis, it would have mandated the vacating and setting aside of the Petitioner's guilty plea under *Alford* as a matter of right under the United States Constitution, rather than remanding the cause for an evidentiary hearing.

OPINIONS BELOW

The Order denying Petitioner's Amended Motion to Vacate Plea, Adjudication and Sentence dated August 5, 1975 is printed as Appendix "A" hereto.

The Opinion of the United States Court of Appeals, Fifth Circuit, dated June 9, 1976, reversing and remanding the said Order and Judgment of the United States District Court for the Southern District of Florida, but rejecting Petitioner's claims of error in that his *Alford* plea was accepted by the trial Court without a sufficient factual basis, is reported at 533 F.2d 900, and printed as Appendix "B" hereto.

JURISDICTION

The Opinion of the United States Court of Appeals, Fifth Circuit, from which Certiorari is sought was entered on June 9, 1976. A timely Petition for Rehearing from a portion of the Court's Opinion was denied on August 6, 1976.

Jurisdiction of this Court is invoked under Title 28, *USC* §2101(c), and Rule 19(b), Supreme Court Rules.

QUESTIONS PRESENTED

1. The Order, Judgment and Decision of the United States Court of Appeals, Fifth Circuit, dated June 9, 1976, from a portion of which Certiorari is sought herein, reversed and remanded an Order and Judgment of the United States District Court for the Southern District of Florida denying Petitioner's Amended Motion to set aside guilty plea, adjudication and sentence, under 28 *USC* §2255, without an evidentiary hearing. However, a portion of the Fifth Circuit Court's Order, Judgment and Decision of June 9, 1976, rejected assertions of error by the Petitioner that his *Alford* plea before the trial Court was accepted by said trial Court without a sufficient factual basis violative of Rule 11, *Federal Rules of Criminal Procedure*, and the Fifth and Sixth Amendment to the United States Constitution.

2. The question presented on this Petition is:

(A) Was the acceptance of the Petitioner's *Alford* plea by the trial Court without sufficient factual

basis, thus violating Rule 11, *Federal Rules of Criminal Procedure* and the Petitioner's rights under the Fifth and Sixth Amendments to the United States Constitution, and thus was the portion of the Fifth Circuit Court of Appeals' Order, Judgment and Decision of June 9, 1976, which rejected Petitioner's claims of error by the trial Court in accepting his *Alford* plea without a sufficient factual basis, fundamental and clear error, violating Petitioner's rights under the Fifth and Sixth Amendments of the United States Constitution.

STATEMENT

I. NATURE OF THE CASE

This Petition emanates from a portion of an Order, Judgment or Decision of the Fifth Circuit Court of Appeals, which rejected an assertion of fundamental constitutional error by Petitioner even though reversing and remanding for evidentiary hearing on another point, an Order of the United States District Court, Southern District of Florida, denying Petitioner's Amended Motion to Vacate and Set Aside Guilty Plea, Adjudication and Sentence Under 28 *USC* §2255, without an evidentiary hearing.

The plea, adjudication and sentence sought to be set aside was to a single Count of an indictment charging certain violations of the Securities and Exchange Act of 1933 and 1934.

The guilty plea was entered under *North Carolina vs. Alford,* 400 U.S. 25, 27 L.Ed.2d 162, 91 S.Ct. 160.

In his §2255 Amended Motion, Petitioner claimed not only that the Government had failed to establish a "sufficient factual basis under Rule 11," but also that his *Alford* plea was coerced by the fraud and deceit of the Assistant U.S. Attorney who conveyed through his defense attorney a false threat that the trial judge had threatened a ten year jail term, if he went to trial and was convicted; alternatively, if the prosecutor's denial be believed, that Petitioner was misled and deceived by his own counsel and thus denied the effectual assistance of counsel.

The Fifth Circuit Court of Appeals reversed the District Court's Order denying the Motion without evidentiary hearing, finding that the Petitioner's supporting third party Affidavits raised "a substantial inference that threats or coercion in fact induced Matthews' guilty plea." The Court's decision is included herein as Appendix "B".

The Court, however, rejected as "without merit" the Petitioner's assertion of error, contending that the trial Court had failed to establish a "sufficient factual basis" for accepting the plea under Rule 11, F.R.C.P. This, Petitioner claims was fundamental error because the record clearly supported Petitioner's claim and mandated as a matter of law, that Petitioner be permitted to withdraw his plea. The Circuit Court of Appeals' ruling that Petitioner was entitled to an evidentiary hearing on his additional claim of coercion, fraud and deceit did not cure its fundamental error denying due process to the Petitioner.

II. PERSONS INVOLVED

THE PETITIONER: C. CAREY MATTHEWS, former Colonel, U.S. Marine Corps Reserve; Combat Infantry Commander at Iwo Jima and Korea; wounded three times in action. At 45 still a Reserve Colonel, he volunteered for airborne service and won the Airborne Parachutist insignia at the U.S. Army Infantry School, Fort Benning, Georgia. A veteran of the 1st and 5th Marine Divisions and member of the 82nd and 101st Army Airborne Division Associations; in 1970 he received the Armed Forces League Distinguished Service Award for valuable service during the Vietnam period as the Commanding Officer of the 4th ANGLICO, USMCR, an elite parachute trained organization.

Petitioner was elected to the Florida Legislature in 1960 and served six terms until his resignation, due to the conviction of the charge herein involved. During this period, he was reelected to serve the people of Dade County six times, three without opposition and rose to the position of Majority Leader, Florida House of Representatives, and held that post at the time of the coerced plea hereinabove referred to.

Petitioner became a member of the New York Bar in 1949 and the Florida Bar in 1954. He held the honorary post of Special Assistant to the Attorney General of Florida for a number of years and served on various important committees of the Florida Bar.

THE RESPONDENT: The United States of America, as represented by the U.S. Attorney for the Southern District of Florida.

III. THE CASE

Petitioner instituted the action below under the provisions of 28 *USC* §2255, on grounds as set forth in Petitioner's Amended Motion to Vacate Plea, accompanying Affidavits and Exhibits, seeking to vacate and set aside Petitioner's guilty plea, adjudication and sentence, previously imposed by the United States District Court for the Southern District of Florida.

On January 7, 1972, the Petitioner, C. Carey Matthews, hereinafter referred to as either Petitioner or Matthews, in the District Court of the United States for the Southern District of Florida, entered a plea of guilty to Count 14, a single Count, of a multi-Count indictment pending against him and three other parties charging him and said parties with certain violations of the Securities and Exchange Act of 1933 and 1934.

After having pled not guilty to all Counts of the indictment and having concluded preparations for trial, on the eve of the trial, after negotiations between his counsel and counsel for the United States, Petitioner entered into an arrangement whereby he entered a plea of guilty to Count 14 and received as a sentence a period of five years of reporting probation. Count 14 charged wilful and intentional violation of Rule 10b-5 of the United States Securities and Exchange Commission, codified as 17 CFR, §240.10b-5, 15 *USC* 78j(b) and 78ff(a).

At the time of entering the plea, Petitioner maintained his innocence and has at all times since the entry of the plea.

Subsequent events and discovery by the Petitioner led him to believe that his plea of guilty was fraudulently obtained through coercion, threats, trickery and deceit of the Assistant United States Attorney handling this matter. Consequently, he brought his Petition under 28 *USC* §2255, seeking to vacate and set aside the plea, adjudication and sentence imposed upon him. Petitioner was coerced into entering a guilty plea to Count 14 of the indictment and tricked into doing so, by reason of what he now believes to be a false threat conveyed by the prosecuting attorney to Petitioner's counsel and through him, to the Petitioner, that United States District Judge, Peter T. Fay, the trial judge, had conveyed the information and the threat that if Petitioner was going to trial, the other Defendants having taken pleas in exchange for favorable sentences, that the said judge would sentence Petitioner, if convicted, to at least ten years in prison.

Petitioner believed that such threats were true and never would have entered a plea of guilty to any Count, except that he believed he was to be denied an unbiased Court and was therefore, coerced into an involuntary guilty plea, while at all times asserting his innocence. Other coercive forces were put upon the Petitioner. Just prior to trial, the Petitioner's principal witness suddenly refused to communicate with Irwin Block, counsel for the Petitioner. It was learned that said witness, a party Defendant in the indictment was to be permitted and had, in fact, entered a plea of guilty to a misdemeanor to the charges before the United States District Court for the Southern District of Florida in exchange for perjured testimony against the Petitioner.

Petitioner verily believed that said witness would perjure himself in an effort to convict the Petitioner and

obtain thereby a favorable reward, to wit, the dismissal of all charges against him in exchange for the acceptance of a guilty plea to a misdemeanor and the silence of the United States authorities in reference to the certain crimes committed against the State of Florida by the said witness as well as to certain additional crimes committed against the United States.

Petitioner was also informed and believed that certain criminals imprisoned for habitual Securities and Exchange Act violations, in exchange for prison and parole favors, were to be witnesses and were prepared to offer perjured testimony against the Petitioner.

It was ultimately determined that Petitioner had not profited from his brief association with State Fire and Casualty Company, the corporation involved in the charges contained in the indictment.

The Affidavit of Neal Sonnett, the Prosecuting Attorney, which was filed in support of the Petitioner's Petition for Termination of Probation, reveals that even the Government and the prosecution eventually conceded that the Petitioner profited in no way by any of the alleged acts contained in the multi-Count indictment that the Government contended were criminal.

Further coercive efforts by the Prosecutor resulted in co-counsel for the Petitioner, Philip J. Mandina, Esq., a Miami attorney, being named as unindicted co-conspirator with the Petitioner, when he refused to testify in accordance with the desires of the Prosecutor and when he continued to assert that he would testify truthfully on behalf of the Petitioner. As a result, Philip

J. Mandina was required to withdraw as co-counsel in this cause.

All of the foregoing actions by the prosecutor convinced the Petitioner that the Government would go to any length, legal or illegal, to obtain a guilty conviction against him and his fears of being denied a fair trial were further confirmed and substance was given to the alleged threat of the presiding Judge, communicated by the prosecuting attorney to his counsel and thence, to him.

Prior to trial, Petitioner was subjected to vicious and vitriolic attacks in the press which caused him to fear that it would be impossible to obtain an objective and fair jury, which led him to believe that the general public would so suspect him and be prejudiced against him that the jury would be influenced to reach a verdict on that ground alone.

Nevertheless, despite all these unlawful pressures and coercions put upon the Petitioner, Petitioner was determined to go to trial in this case until certain events which transpired just before the date of the trial. On or about January 7, 1972, the Petitioner and his partner and co-counsel, Philip J. Mandina were discussing the case at their office, when Petitioner's counsel Irwin Block called and requested both Mandina and Matthews to get on different extensions of the phone.

Block related that the prosecutor, Mr. Sonnett, had advised him that he had just left the office of Judge Peter Fay, the trial Judge, and that the Judge was upset about the possibilities of a long trial, and had conveyed to him that a message should be made known

to Matthews and his counsel that in the event of conviction, Matthews would receive a ten year sentence.

Matthews, not believing that the Chief of the Criminal Division of the United States Attorney's Office would risk deliberately lying about a threat like this, believed the threat and stated to Mandina and Block, "this is a terrible threat to put on a man with three children, a one year old, a three year old and a four year old, what would ever become of them? I can't afford to take a chance on a conviction and a ten year sentence, especially with a threat like this, for my family's sake, I really have no alternative."

Petitioner then met with his attorney and entered a plea of guilty under *North Carolina vs. Alford,* nevertheless asserting his innocence of the Count to which he was pleading guilty and that he had committed no criminal act.

Count 14 of the indictment claimed a violation of 15 *USC* §78j(b) and 78ff(a), and an identical regulation of the Securities and Exchange Commission, codified as 17 CFR §240.10b-5. Petitioner was charged under Count 14 with wilfully and knowingly, in connection with the purchase and sale of certain State Fire and Casualty Co. and Mercantile National Bank's Securities, using the mails and employing a manipulative and deceptive device and contrivance in contravention of Rule 240.10b-5 of the SEC in causing a State Fire Proxy Statement to be mailed on or about January 10, 1968, which made untrue statements of material facts and omitted to state material facts necessary in order to make the statements made, in the light of the

circumstances under which they were made, not misleading. Fraud and deceit in doing so were claimed.

At the time when Matthews was brought before the trial Judge and entered his *Alford* plea, and was asked by the trial Judge the routine questions asked when a guilty plea is accepted, including whether or not he had been threatened or coerced into entering his plea, he, not being under oath, stated that he had not been threatened or coerced, even saying he thought the U.S. Attorney had treated him with great courtesy, fully believing then that the said U.S. Attorney had done a friendly act in warning him of the threat of punitive sentence if he did not plead guilty.

Matthews so stated on January 7, 1972, at the time of entering the guilty plea because then, but not now, he believed that the Judge who was inquiring of him had actually been the person who had made the threat to imprison him for ten years, if convicted at trial, on that very day, and he felt that if he revealed the threat in open Court that the Court would then be totally hostile, reject his plea, put him to trial, and if convicted, would sentence him to an even harsher term.

Furthermore, Matthews knew of his own experience which was almost entirely in State Courts, that the "guilty plea colloquy" where a plea is negotiated, was largely a charade where the Defendant has been promised a light sentence or a reduced charge in exchange for his guilty plea, but denies to the Court on interrogation that any promises have been made to him, while the prosecutor and his own defense counsel, who have exchanged the promises on his behalf, look on in silence to his necessary untruth, which is part of the plea bargaining game.

This procedure is largely changed now, even in State Courts, but the practice prevailed on January 7, 1972.

In any event, neither Irwin Block, his attorney, or Neal Sonnett, the Chief Prosecutor, who had discussed on that very day the alleged statement by Judge Fay about giving Matthews a ten year prison term, said a word as to what had transpired between them, although both being officers of the Court, far more than Matthews, the Defendant, had a duty to step forward. In Block's case he owed the duty of "loyal counsel" under the Sixth Amendment.

At the time of sentencing, the same situation prevailed as of the time of answering the guilty plea, and Matthews did not dare to reveal what he knew of the alleged threat by the trial Judge for fear of receiving an even harsher sentence if convicted after trial.

The prosecutor and the defense counsel likewise stood mute although it was they who had conveyed the so-called threat or information to Matthews of the ten year prospective sentence.

At the time of the entry of the *Alford* plea the trial judge taking the plea, neither made inquiry into nor sought to resolve the conflict between Matthews' waiver of trial and his asserted claim of innocence, as required under *Alford*.

The entire factual basis consisted of three questions put by the prosecutor to David A. Ross, the trial attorney for the SEC handling the case, after the initial inquiry, establishing Mr. Ross' identity and that he had

conducted the investigation in question which led to the indictment.

All pertinent parts of the colloquy are appended hereto in their entirety as Appendix "C".

Ross stated that after reviewing documents and interviewing witnesses it had been determined that Matthews caused the mails to be used to distribute a proxy statement to State Fire stockholders on or about January 10, 1968, which statement did not include certain material information regarding activities of Capital Bank Shares, Inc. and people connected with State Fire, in connection with the proposal to postpone a recapitalization plan for State Fire.

It was further stated that his investigation showed that Matthews, at the time, was general counsel at State Fire, a nominee for Director or possibly a Vice President of State Fire, and that the factual allegations contained in Count XIV to which the Petitioner was pleading were those that were established by his personal investigation, interviews with witnesses, examination of corporate records and other records.

The foregoing constitutes the entire factual basis upon which the Court accepted the Petitioner's *Alford* plea. Not even the basic elements of Count XIV were covered by Ross's summarization. There was no showing of what material information was omitted from the proxy statement in question, or that Matthews knew that material information was omitted, or of any acts of fraud or deceit committed by Matthews or known by Matthews to have been committed in connection therewith. It is not even contended in the so-called

factual basis offered, that Matthews wilfully or intentionally committed any of the acts charged. The trial Judge himself asked no single question as to the factual basis, nor did he inquire into, nor did he in any way seek to resolve the conflict between the waiver of trial and Matthews' claim of innocence.

It is clear from the colloquy at the time of plea that Ross did not sufficiently portray the facts necessary to establish a sufficient factual basis, that the elements of the offense charged against the Petitioner under Count XIV had actually occurred.

In this instance, where four defendants were charged there was an insufficient statement of the acts and intent of this particular defendant, the Petitioner herein; of what this particular defendant, the Petitioner did, knew and intended; all of which are necessary for an intelligent determination of whether there was a factual basis for the plea.

The Court's own feeling, that there was an insufficient factual basis for the plea and that he was unable to make an intelligent determination thereto, is evidenced from the colloquy which occurred at the post trial hearing of January 10, 1975, in re termination of probation, which was part of the record below. Judge Fay:

> "As I say, this denial is without prejudice for Mr. Matthews to present anything to me, if there is such, that the charges were unfounded or that there was something the Court was not

aware of that it should have been aware of at that time."

* * *

"This Court never really knew what the facts of these cases were. I discussed that with Mr. Sonnett at the time. It probably would have taken two months for me to know what the facts of the situation were."

* * *

"I do not say it was the fault of anybody. I do not think it was. The Court never really knew what the case was about. The Court had to rely upon the recommendations being made by the Government and by defense counsel, and that is what I did."

* * *

". . . I do not have any preconceived ideas about it because I never really knew that much about the factual background. The factual basis was established, but it was done in a very routine, cursory way. I was satisfied that the Government was operating in good faith and that the defense counsel were operating in good faith and I followed the ABA procedures.

"As I say, and I am repeating myself now, I do not think I would ever do it again. I did it in that case."

In addition, as Judge Fay stated at the January 10th hearing, his own good opinion of the Petitioner's reputation and background was confirmed by the presentence investigation report of the United States Probation personnel. Judge Fay said:

> "There is no question about Mr. Matthews' reputation in this community or what he did or his background. There was never any doubt about that.
>
> "The PSI confirmed all of that."

Matthews continued for some years after the entry of the plea and the sentencing to labor under the belief that the alleged threat of a ten-year sentence communicated by the prosecuting attorney to Irwin Block and thereafter, to him and to his co-counsel, Philip Mandina, had actually been made by Judge Fay. It was not until a certain Wall Street Journal article referred to in his §2255 Motion was brought to his attention, in April of 1974, that he began to have doubts that the threat may not indeed have been genuine, but was part of a scheme to coerce him into pleading guilty in order to further the political aims of the prosecutor. The Article is Appendix "E".

The type of Judge and person the Honorable Peter T. Fay is, as well as his growing reputation for justice and fairness, further indicated to Matthews the possibility that such threat may never had been made.

The Petitioner finally became convinced by remarks made by Judge Fay at the aforementioned hearing on January 10, 1975, on Matthews' Petition for

Termination of Probation, that Judge Fay certainly could not have made such a threat. Fay denied the Petition, but stated:

> **"I have serious doubts that I will ever take another plea under the *Alford* principle, because it's just a horrible, horrible situation and you end up with exactly what Mr. Matthews has ended up with. He has ended up with a five year punishment.**
>
> **"I am perfectly aware that probation is a punishment, a severe punishment in Mr. Matthews' case, because, as I understand it, he cannot practice law. It is a severe punishment.**
>
> **"Yet he has consistently professed that he is completely innocent. Under the *Alford* case, the plea can be accepted even with that situation, and I will stand by the statement I made then, at least that I think I made then, that the whole procedure is completely inconsistent with the administration of justice. There never has been and apparently there never will be, a true adjudication of whether this man is innocent or guilty of these charges that were brought against him."**

It seemed inconceivable to the Petitioner, having heard those remarks, that Judge Fay would have made such a threat. As a result thereof, Petitioner filed his Motion under §2255, being convinced of Judge Fay's sincerity and acting on Judge Fay's invitation to come forward.

As aforesaid, Petitioner's §2255 Motion was filed in the United States District Court for the Southern District of Florida, on June 10, 1975, and on August 5, 1975, that Court dismissed the Petition without an evidentiary hearing, Judge Fay having recused himself.

Petitioner took appeal to the Fifth Circuit Court of Appeals which reversed the order of the District Court and remanded the cause for evidentiary hearing on the question of coercion. The Circuit Court of Appeals rejected as without merit the Petitioner's claim that there was an insufficient factual basis for the initial trial judge to have accepted his guilty plea under *Alford*.

Petition for Rehearing was denied on August 6, 1976, and said Order is appended hereto as Appendix "D".

It is from the Fifth Circuit Court's Order, Judgment and Decision of June 9, 1976, which rejected Petitioner's claim that there was insufficient factual basis for the trial Court to have accepted his guilty plea under Rule 11, *Federal Rules of Criminal Procedure*, and the Fifth and Sixth Amendments, and from the same Court's subsequent denial of Petition for Rehearing on August 6, 1976, that Petitioner has brought this application for Writ of Certiorari.

The record as established by Petitioner's §2255 Motion, reveals that Matthews neither saw, prepared, nor mailed, directly or indirectly, the Proxy Statement of January 10, 1968, to State Fire stockholders. The Proxy Statement reveals that the Petitioner was not a director of the company at the time of the preparation or mailing of the Proxy but was merely a nominee.

Matthews took nc part in the preparation of the Statement nor in any negotiations, meetings or conferences involving the preparation thereof.

Various Exhibits appended to Petitioner's Motion under §2255 clearly show that Matthews had nothing to do with the Proxy Statement and its mailing and that said mailing occurred without his knowledge, participation, wilfullness or consent.

None of the persons who the Exhibits revealed did the mailing, who caused the mailing to be made and who prepared the Proxy were indicted, except for Benjamin Dobson, the President of State Fire. The Government's own files reveal that actually the Proxy Statement was prepared by Norman Liebling, a Chicago attorney who was the general counsel for State Fire, up until the time of the appointment of Matthews to succeed him. Liebling was an experienced security attorney while Matthews had no experience in the field whatsoever and never handled any public offering and never held himself out as an expert in this area, and was not hired for the purpose of dealing and negotiating in any way with the Proxy Statement or the dissemination by mail or otherwise of the information in it.

Matthews contended in his Petition that the political ambition of the United States prosecuting attorney was the moving factor in the perpetration of the fraudulent scheme which induced him to plead guilty. In support of this position, appended to the Petition, was the aforementioned excerpt from the Wall Street Journal of April 28, 1974, containing a statement to the press of David Ross, Esquire, the trial attorney for the SEC, who had investigated and prepared the case and

who tried to establish the factual basis for acceptance of the plea before the trial Court. The article principally dealt with the co-Defendant, Mort Zimmerman, and the reason why Zimmerman had not received a jail sentence in the case.

The article quoted Ross as saying Zimmerman's sentence had come about because he had, "promised to testify against a co-Defendant, Carey Matthews, a prominent Florida legislator, against whom evidence was weak. He says that Mr. Sonnett, the Assistant U.S. Attorney in Miami, was more interested in convicting a local politician, Mr. Matthews, because Mr. Sonnett was about to quit his job to run for state office and the Matthews' conviction would be a feather in his cap. Mr. Sonnett did quit to seek the Democratic nomination for State Attorney in Dade County, and lost; . . ." (Appendix "E").

It is highly significant that the same attorney who tried to establish the factual basis for acceptance of the *Alford* plea, was the attorney who stated to the Press that the case versus Matthews was indeed "weak."

Petitioner's version of the supposed threat, conveyed by Sonnett to Block to him, is substantiated and corroborated by the Affidavit of Philip Mandina, Esquire, his former law partner and by the Affidavit of Irwin Block, his attorney. (Appendix "F" and Appendix "G").

Block's statement appended to Petitioner's Motion corroborated that Sonnett advised him on the eve of trial that the Court had indicated, "if Carey Matthews went to trial and was found guilty he would be sentenc-

ed to a substantial term of years, the exact number of which Affiant does not remember today, but which he believes to be in excess of ten years."

Block stated that he immediately conveyed this information to the Petitioner, who thereafter, decided to plead guilty rather than take the chance of being sentenced to the time indicated by Sonnett.

Since the portion of Matthews' Petition which is based on the contention that he was coerced into entering a guilty plea through the trickery and deceit of the prosecuting attorney in conveying to him a threat of punishment which he now believes to be false, is based on the sworn Affidavits of the Petitioner, Philip Mandina, his law partner and Irwin Block, his attorney, the character and background of these three gentlemen is vital in terms of their veracity. All three are officers or former officers of the Fifth Circuit Court of Appeals Court and all have much to lose and with the exception of Matthews, nothing to gain, if their Affidavits were not true and correct. As to Matthews, he has already served 95% of his entire sentence and for him the battle for vindication is now largely academic, although it might possibly open the way to recommence the practice of law, if he so desires. In any event, his military career as a reservist and his political career as Majority Leader of the Florida House of Representatives are clearly ended.

Status of the Litigation

As stated, supra, Petitioner pleaded guilty to Count 14 of the Indictment of violation of SEC charges on January 7, 1972. He subsequently was sentenced to

five years of reporting probation, and on January 10, 1975, his Petition to Terminate Probation was denied, after hearing by the trial Judge, Peter T. Fay.

On June 10, 1975, Petitioner's §2255 Motion to Vacate, Set Aside Sentence, Adjudication and Plea, was filed with the United States District Court for the Southern District of Florida, supported by Affidavit of Irwin J. Block, his original attorney at the time of the plea, and by the Affidavit of Philip J. Mandina, his former law partner. His own Motion was sworn to in Affidavit form by Petitioner himself. On June 27, 1975, the Petitioner filed an Amended Motion to Vacate, Set Aside Sentence, Adjudication and Guilty Plea, under §2255, and applicable Court rules, incorporating his previous Motion and Exhibits.

On August 5, 1975, The District Court entered an Order dismissing the Petition and denying the same.

From said Order of August 5, 1975, Matthews took an appeal to the United States Court of Appeals, Fifth Circuit. On June 9, 1976, that Court entered its Order reversing the Order of the United States District Court dismissing the cause, stating that Matthews was entitled to an evidentiary hearing on his claim, a "substantial inference" having been raised by the Matthews' Petition and Exhibits, that threats of coercion had induced Matthews' guilty plea.

This Petition emanates from a portion of that Order, Judgment or Decision of the Fifth Circuit Court of Appeals, which rejected an assertion of fundamental constitutional error by Petitioner even though reversing and remanding for evidentiary hearing on another

point, an Order of the United States District Court, Southern District of Florida, denying Petitioner's Amended Motion to Vacate and Set Aside Guilty Plea, Adjudication and Sentence Under 28 *USC* §2255, without an evidentiary hearing.

REASONS FOR GRANTING THE WRIT

It is clearly fundamentally erroneous for the Fifth Circuit Court of Appeals to permit an *Alford* plea of guilty to stand which had been accepted by the trial Court from the Petitioner, while contending his innocence, without a sufficient factual basis, thus violating Rule 11, F.R.C.P., and the Fifth and Sixth Amendments to the Constitution of the United States.

Since *McCarthy vs. United States,* 394 U.S. 459, 22 L.Ed.2d 418, 89 S.Ct. 1166, this Court has made clear that Judgment shall not be entered upon a guilty plea unless the trial Court is satisfied that there is sufficient factual basis for the plea, under Rule 11, F.R.C.P.

This is particularly true in a case such as the case at bar, where the Petitioner has charged that his plea was coerced and that it was not voluntary and where the Fifth Circuit Court of Appeals has found, as stated in his Opinion that the supporting Affidavits appended to the Petitioner's §2255 Motion, raised a substantial inference that threats or coercion, in fact, had induced the Petitioner's guilty plea.

As this Court pointed out in *McCarthy,* supra, and in *Boykin vs. Alabama,* 395 U.S. 238, 23 L.Ed. 274, 89 S.Ct. 1709, the Defendant who enters a guilty plea

simultaneously waives several constitutional rights, under both the Fifth and Sixth Amendments and that these important rights cannot be presumed from a silent record.

Particularly applicable hereto is the case of *North Carolina vs. Alford,* supra, wherein upholding the validity of a Defendant's guilty plea to murder, the Court noted that because of the importance of protecting the innocent and of insuring that guilty pleas are a product of free and intelligent choice, various State and Federal Courts have properly cautioned that pleas coupled with claims of innocence should not be accepted unless there is a strong factual basis for the plea and until the Judge has inquired into and sought to resolve the conflict between the waiver of trial and the claim of innocence. The Federal Courts are controlled by an express provision of Rule 11, that a court shall not enter a Judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

As pointed out herein, supra, and as evidenced by the plea colloquy (Appendix "C") the trial judge did not inquire into and seek to resolve the conflict between the waiver of trial by the Petitioner and Petitioner's claim of innocence. As to this, there is no question because the record is crystal clear.

Petitioner contends that any reasonable construction of the record reveals an insufficient factual basis for the plea, particularly for the strong factual basis required for an *Alford* plea by this Court in its *Alford* guidelines.

The post-plea dissatisfaction with the factual basis for accepting the plea is best expressed by the trial Judge who did accept the plea. At the time of Petitioner's request to terminate probation, the trial Judge stated:

> "This court never really knew what the facts of these cases were. And further, the court never really knew what the case was about. The court had to rely upon the recommendation being made by the Government and by defense counsel and that is what I did."

Rule 11, of the F.R.C.P., specifically provides:

> "The court shall not enter a Judgment upon a plea of guilty unless it is satisfied that there is factual basis for the plea."

The Fifth Circuit Court of Appeals in rendering its decision in the instant cause as to the merits of the Petitioner's Rule 11 claim, failed to consider the statements of the trial judge above which indicated that the basic requirement as to the court having been satisfied is not met.

The trial court could accept the *Alford* plea of the Petitioner, only under the guidelines laid down by this Court in the *Alford* decision.

This Court held the *Alford* plea acceptable because of the strong factual basis for the plea in that case, which was demonstrated at the time of accepting the plea, and the evidence presented to the Court which substantially negated any claim of innocence. The

evidence was determined by the Court to be "overwhelming."

As pointed out in *Alford,* supra, this "overwhelming" evidence included the presentation of evidence to the trial judge accepting the plea, from two witnesses who testified to an account of the events on the night of the murder, including information from friends of Alford that he had departed from his home with his gun stating his intention to kill and that he later returned declaring he had carried out his intentions.

In addition, the factual evidence was further summarized and presented by police officials.

In the instant cause, no witnesses whatsoever testified in connection with the Petitioner's plea other than what the court termed, a "cursory" recitation by the Government attorney, simply stating that the mails had been used by the Petitioner to distribute a Proxy Statement violating the Statute and the SEC rule involved.

As was stated in a decision by the Second Circuit Court of Appeals in *Griffin vs. United States,* 405 F.2d 1378, in accepting a guilty plea where a Defendant protests his innocence, the Rule is:

> "The plea may be accepted even though the Defendant emphasizes his plea with the statement that he is not guilty, under the determination that incriminatory evidence establishes such a high probability of conviction as to satisfy the requirement that there be a factual basis for the plea before Judgment can be entered thereon."

Obviously, the bare bones and cursory recitation by the Government attorney in attempting to establish a factual basis in the instant cause did not establish a strong factual basis and a high probability of the conviction of the Petitioner, a clear and erroneous departure from the rule laid down by this Court in *Alford*, et alia.

Nowhere in the record before the trial court in the instant cause, is there "overwhelming" or "strong evidence of actual guilt" nor does the evidence against the Petitioner presented to the trial judge substantially negate the Petitioner's claim of innocence nor did the trail judge inquire into nor seek to resolve the conflict between the Petitioner's waiver of trial by plea and his asserted claim of innocence, which is required by this Court's guidelines under *Alford*.

The "cursory" factual basis offered to the Court by David Ross, trial attorney for the SEC handling the case, reduced to simplicity, simply stated that Ross had reviewed documents and interviewed witnesses and determined that Matthews had caused the mail to be used to distribute a Proxy Statement which violated the Statutes and Rules involved. This constituted the entire factual basis and clearly did not meet the standards of *Alford*, of Rule 11, F.R.C.P., or of due process.

In fact, the factual basis supplied would not be sufficient to satisfy Rule 11, F.R.C.P., or due process, even in a non *Alford* guilty plea. However, the Fifth Circuit Court of Appeals in the decision from which review is sought herein, failed to find merit in Petitioner's contention, and the clear principle of law thereby espoused, that the factual basis under Rule 11

for acceptance of an *Alford* plea, is quantitatively and qualitatively different and stronger than the factual basis required for a non *Alford* plea.

In arriving at said conclusion, it can only be noted that both lower Courts have clearly ignored the statements of this Honorable Court in *Alford* in upholding the validity of the Defendant's guilty plea in a four-three decision.

Further, it must be stated that although the Court entered its Judgment in the Petitioner's case upon his *Alford* plea of guilty, and the Government's feeble attempt to establish a factual basis, there can be no doubt from subsequent statements by the trial judge in the record, that subsequent post trial motions revealed that the Court was dissatisfied with the manner in which the plea was entered, and whether or not the Court knew all that it should have known at the time of the plea. The Court further stated that because of this case, he would never again accept an *Alford* plea.

The trial Judge summed up the situation with this statement:

> ". . .[T]he whole procedure is inconsistent with the administration of justice, there never has been and apparently there never will be a true adjudication of whether this man is innocent or guilty of these charges that were brought against him."

Even in non *Alford* pleas, this Court has held that independently of any constitutional grounds, a United States District Court may not accept a Defendant's

guilty plea, without further adhering to this and all other provisions of Rule 11.

This Court has held that independently of any constitutional grounds, a United States District Court may not accept a Defendant's guilty plea without fully adhering to this and all other provisions of Rule 11. *McCarthy vs. United States,* (1969), 394 U.S. 459, 22 L.Ed.2d 418, 89 S.Ct. 1166. In the part of the Opinion relevant to this cause, the Court added that because a guilty plea is an admission of all the elements of a formal criminal charge, that judgment should not be entered upon a plea of guilty unless the District Court is satisfied that there is a factual basis for the plea and that the judge must determine, "that the conduct which the Defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the Defendant has pleaded guilty."

In considering what is a sufficient factual basis to sustain the guilty plea in the instant cause, it must be recognized from the onset that the guilty plea in this case is one unique in the law as to which there are few precedents. It is an *Alford* plea, where the Petitioner has throughout maintained his innocence of the charge. Thus, acceptance of an *Alford* plea, should logically and precedentially, require, at the very least, a following of the Rule in that regard as set forth in *Alford.*

In *Alford,* a prime requisite of the acceptance by the Supreme Court of his guilty although innocent plea,

was an extremely strong factual basis presented to the Court. The Court said:

> "In addition to Alford's statements, however, the Court had heard an account of the events on the night of the murder including information from Alford's acquaintances that he had departed from his home with his gun stating his intention to kill and that he had later declared that he had carried out his intentions."

Two witnesses so testified and in addition, there was a summarization of the factual evidence presented by the police official.

This Court, in holding Alfred's plea acceptable stated:

> "Because of the *overwhelming evidence* against him, a trial was precisely what neither Alford nor his attorney desired . . . [W]hen his plea is viewed in light of the evidence against him, which *substantially negated* his claim *of innocence* and which further provided a means by which the judge could test whether the plea was being intelligently entered, validity cannot be seriously questioned. *In view of strong factual basis for the plea demonstrated by the State* and Alford's clearly expressed statements entered despite his professed belief in his innocence, we hold that the

trial judge did not commit constitutional error in accepting it." (Emphasis Supplied)

Under *Alford*, then, in order to justify compliance with Rule 11 as to the factual basis for the plea, a strong factual basis must be laid which substantially negates the plea of innocence. In *Alford* the evidence was termed by the Court, "overwhelming."

McCarthy, supra, indicates that at least every element of the offense should be demonstrated by the Government in setting forth the factual basis, as well.

Citing the *McCarthy* case, in footnote 10, the *Alford* Court said:

"10. Because of the importance of protecting the innocent and of insuring that guilty pleas are a product of free and intelligent choice, various states and federal courts' decisions properly caution that pleas coupled with claims of innocence should not be accepted unless there is a factual basis for the plea, see e.g., Griffin vs. United States, 132 U.S.App. D.C. 108, 110, 405 F.2d 1378, 1380 (1968); Bruce vs. United States, supra, at 342, 379 F.2d 119 (1967); Commonwealth vs. Cottrell, 433 PA 177, 249 A 2d 294 (1969); and until the *judge taking the plea his inquired into and sought to resolve the conflict between the waiver of trial and the claim of innocence.* See, e.g., People vs. Serrano, 15 NY2d 304, 308-309, 206 NE 2d 330, 332 (1965); State vs. Branner,

149 NC 559, 563, 63 SE 169, 171 (1908). See also Kreuter vs. United States, 201 F.2d 33, 36 (C.A. 10 1952).

"In the federal courts, federal rule F.R.C.P. 11 expressly provides that a court 'shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea." (Emphasis Supplied)

When the guidelines of the *Alford* Court are measured against the factual basis in this particular case, it is clear that said guidelines were not met by the trial Court and that relief should as a matter of law, be granted to the Petitioner.

Nowhere does the Matthew record contain, "strong evidence of actual guilt" nor does the evidence against him presented to the trial judge "substantially negate his claim of innocence." Certainly the trial judge taking the plea did not inquire into and seek to resolve the conflict between Matthews' waiver of trial and his asserted claim of innocence as required under *Alford*.

As pointed out, supra, the entire factual basis consisted of three questions put by the prosecutor to David A. Ross, the trial attorney with the SEC handling the case.

Summarizing the colloquy, which is laid out in its entirety herein at Appendix "C" Ross stated that after reviewing documents and interviewing witnesses, it had been determined that Matthews caused the mails to be used to distribute a Proxy Statement to State Fire stockholders on or about January 10, 1968, which statement did not include certain material information

regarding activities of Capitalbank Shares and people connected with State Fire, in connection with the proposal to postpone a recapitalization plan for State Fire. Ross further stated that his investigation showed that Matthews at the time was general counsel at State Fire, a nominee for director or possibly, a vice president of State Fire, and that factual allegations contained in Count 14 were those that were established by his personal investigation, interviews with witnesses, examination of corporate records and other records.

The foregoing constitutes the entire factual basis, and as we submit, this does not meet the standards of *Alford,* Rule 11, or due process. Not even the basic elements of Count 14 are covered by Ross's summarization. There was no showing of what material information was omitted on the Proxy Statement in question or that Matthews knew that material information was omitted or of any acts of fraud or deceit committed by Matthews or known by Matthews to have been committed in connection therewith. It is not even contended in the so-called factual basis offered that Matthews wilfully or intentionally, committed any of the acts charged. No single question was asked by the trial judge as to the factual basis and he did not inquire into nor did in any way seek to resolve the conflict between the waiver of trial and Petitioner's claim of innocence.

Ergo, the strong factual basis required in order to authorize the acceptance by the court of a guilty but innocent plea, under *Alford,* was not established in the Matthews' case, and Matthews' Petition should be granted.

> "The Court should satisfy itself, by inquiry of the defendant or the attorney for the Govern-

> ment or be examining the pre-sentencing report or otherwise, that the conduct which the defendant admits constitutes the offense charged."

Irizzary vs. United States, 508 F.2d 1960, (2 Cir. 1974).

Here the factual basis established by Ross did not begin to extend to the basic elements of the charge or to the parameters of the statutory violation claimed.

In fact, nothing could be more clear from the record and this Petition, that the trial judge has not satisfied himself as to the factual basis. Nothing could be more telling in regard to the inadequacy of the factual basis presented in the Matthews' case than Judge Fay's own observations at the hearing in this matter on January 10, 1975.

Summarizing again, the trial judge said that he never really knew what the facts of these cases were and that it would probably take him two months to know what the facts in the situation were. Further, he never really knew what the case was about and relied on the recommendations being made by the Government and defense counsel. The Court further stated that he never really knew that much about the factual background and that the factual background was established but it was done *in a very routine and cursory* way. He was satisfied that the Government was operating in good faith and that defense counsel had followed ABA procedures.

His own soul searching analysis of the procedure was:

"As I say, and I am repeating myself now, I do not think I would ever do it again. I did it in that case."

In all justice, does the foregoing not establish that post trial, the judge was not "satisfied" that a sufficient factual basis was shown to enable the plea to be accepted?

The guilty plea colloquy disclosed nothing more than a bare bones recitation by Mr. Ross as to the factual circumstances and further discloses as a result of such bare bones recitation that at a subsequent date the trial Court itself became totally unsatisfied with the evidence before it and was itself unconvinced as to the guilt of the Petitioner. The Court stated, at the subsequent hearing:

"My recollection is that the gist of those comments was that if Mr. Matthews or any of the other Defendants in the case was truly guilty of the charges that have been brought against them, then society has been cheated and if they were not guilty of the charges they have been cheated. *I still don't know where the answer is.*" (Emphasis Supplied)

The trial judge further stated:

"As I say, this denial is without prejudice to Mr. Matthews to present anything to me if such there is that the charges were unfounded or that there was something that the Court was not aware of or that it should have been aware of at that time. You see at this time I am not aware of that situation. I did not like it when it

was tended to the Court, I did not like anything about it and stated in open court that I did not like it. It is the only plea that I am aware of that I have ever received under Alford vs. North Carolina. I know the Supreme Court has approved of it I have serious doubts that I will ever take another plea under the Alford principle . . ."

If, in fact, the trial judge himself stated that the factual basis for the acceptance of the guilty plea was routine and cursory, can anyone argue with substance that a strong factual basis was shown, as is required by this Supreme Court in an *Alford* plea? The judge said:

"As I say, and I am repeating myself now, I do not think I would ever do it again, I did it in that case."

As pointed out, supra, in addition to the "strong factual basis" guidelines laid down by this Court in *Alford*, other federal courts have overlaid an additional requirement that incriminatory evidence must be shown at plea time, which will establish a "high probability" of conviction. *Bruce vs. United States*, 375 F.2d 119; *Griffin*, supra.

In the instant cause no one has ever contended on behalf of the government that the factual basis shown in the instant cause established either a high probability of conviction or that there was a strong factual basis.

The entire procedure employed in the trial court and in the Fifth Circuit Court of Appeals in Petitioner's cause is "completely inconsistent with the administration of justice." Is the foregoing statement, that of

the Petitioner? Indeed not . . .; it is the statement of the trial judge himself as to the proceedings in the Petitioner's case, the taking of the plea and adjudication. He also stated "there has never been and apparently never will be a true adjudication of whether this man is innocent or guilty of these charges that were brought against him."

Could the Petitioner argue more vehemently than this on his own behalf, that there has been a denial of justice in this case and that he has been deprived of a battery of constitutional rights guaranteed to him under the Fifth and Sixth Amendments?

No sufficient factual basis for acceptance of the *Alford* plea was made by the Government at plea taking time, and consequently, the plea, adjudication and sentence herein should be vacated.

CONCLUSION

To summarize, this Honorable Court now has for consideration a case in which the trial court, the United States District Court for the Southern District of Florida, accepted an *Alford* plea by this Petitioner, protesting his innocence, without sufficient factual basis. As hereinabove quoted, under the guidelines set down by this Court in *Alford,* such a plea must be supported by the strongest of factual basis, and the evidence presented to the trial judge accepting the *Alford* plea must be "overwhelming". Other Federal cases establish that an *Alford* type plea can only be accepted on a determination that incriminatory evidence establishes such a high probability of conviction so as to satisfy the requirement that there be a

factual basis for the plea before Judgment can be entered thereon. *Griffin,* supra, and *Bruce,* supra.

The *Bruce* Court, the District of Columbia Circuit Court of Appeals, quoted in a footnote, in setting down the "high probability of conviction" guideline in an *Alford* situation, the following language from the American Bar Association project on minimum standards for criminal justice, "Standards Relating to Pleas of Guilty":

> ". . . [T]he fear least an innocent man be unjustly punished bids the court be chary before it accepts a plea of guilty filed by one proclaiming that he is not guilty . . . yet there is room for the conclusion that judgment on a plea of guilty is not contrary to justice if based *on a high probability of the outcome of trial,* even though neither a plea nor a verdict of guilty would conform to the defendant's subjective evaluation. Examples include not only the easy case where the accused relates facts that the judge identifies as a crime, but also the case where the question of guilt involves judgment, rather than clear-cut facts (as in a crime of recklessness); the judge need not reach a definite conclusion of guilt if he is satisfied of a high probability of conviction.
>
> "The juridical question is more troublesome when the guilt turns on a fact like the intention of an accused which the accused denies . . . Without intimating that judgment cannot be entered on a plea of guilty in such a case, it is suggested that it may harmonize better with prevailing juridicial philosophy if a

court desiring to approve a plea procedure for the defendant uses the plea of nolo contendere." (Emphasis Supplied)

It is to be noted that in the instant case obviously, that the intention of the accused was a basic element of the complicated offense of which he was charged and no evidence whatsoever was brought forward as to that intention in attempting to show the factual basis. Indeed also no one has ever contended a high probability of conviction in the instant cause. The statement of trial attorney for the S.E.C., David Ross to the press, referred to supra, indicated that the case against Matthews was very weak. It must also be noted that Matthews' plea was not entered because of any allegations or feeling on his part of high probability of conviction, but was based upon what he believed to be a coerced threat of a ten year sentence.

We need not belabor the point that the Petitioner has been denied a host of constitutional rights, including his privilege against compulsory self incrimination, his right to due process and his right to the effective assistance of counsel. (If the prosecutor is believed).

In short, in the instant cause, a threat was conveyed by the Petitioner's attorney to him of a ten year jail sentence if he did not enter a guilty plea, allegedly from the trial judge via the prosecutor.

No one denies that Petitioner received such a threat and his counsel, the former President of the Dade County Bar Association, so stated in an Affidavit.

The Petitioner himself now knows that the trial judge made no such threat, but nevertheless he believed

that he had, at the time of plea and the threat, was in fact, conveyed to him by his attorney.

It is immaterial in this cause to Matthews whether the Assistant U.S. Attorney actually conveyed a threat to Petitioner's counsel or only conveyed language which Petitioner's experienced counsel interpreted to be a threat and so conveyed to the Petitioner.

In any event, it is undisputed, and the Government does not deny, that Matthews' counsel conveyed the threat to him; it only denies that such a threat emanated from the Government.

The point being, as the record shows, that believing such a threat had been made, Matthews' plea was involuntary and the Government failed to present a sufficient factual basis for the acceptance of an *Alford* plea. The Petitioner did not make his non *Alford* plea because of ignorance, but because of compulsion.

The trial judge himself, as pointed out supra, has subsequently indicated his own dissatisfaction with the acceptance of the plea, and indeed, under such circumstances it should be mandated that the Petition to vacate plea, adjudication and sentence be granted and the Petitioner be afforded the trial to which he is entitled under the United States Constitution.

The Petitioner's plea was involuntary because of what he believed to be the threat conveyed to him through his attorney by the Government of a ten year prison term. The Government failed to show a strong factual basis for the acceptance of the plea as required under Rule 11, F.R.C.P., and under *Alford*. No high probability of conviction was shown and obviously, there was none.

The trial judge did not personally inquire of the Petitioner as to the facts and evidence in the cause nor make any attempt to reconcile the Petitioner's waiver of trial by plea of guilt, but Petitioner's assertion that he was innocent.

Accordingly, the Order and Judgment of the United States District Court for the Southern District of Florida of August 5, 1975, denying Petitioner's Amended Motion to Vacate Plea, Adjudication of Sentence Under §2255, was clearly erroneous and fundamental error. So too, was the Order, Judgment and Decision of the Fifth Circuit Court of Appeals of June 9, 1976, which rejected the assertion of error by the Petitioner claiming that the Government had failed to establish a sufficient factual basis of the acceptance of his *Alford* plea at time of trial. That finding and decision by the Fifth Circuit Court of Appeals was clearly erroneous and fundamental error and had the effect of denying the Petitioner's constitutional rights under the Fourth and Fifth Amendments. For such reasons we respectfully urge that this Court grant Certiorari.

Respectfully submitted,

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By _____
Leo Greenfield

APPENDIX

APPENDIX "A"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA, Plaintiff, -vs- C. CAREY MATTHEWS, Defendant.	CASE NO. 75-1134 CIV-CA ORDER OF DISMISSAL

FILED
AUG 5 1975
JOSEPH I. BOCARI
CLERK, U. S. DIST. CT.
SOUTHERN DIST. OF FLA.
MIAMI, FLA.

Petitioner, C. Carey Matthews has filed this Motion to Vacate and set aside sentence and adjudication and guilty plea pursuant to 28 U.S.C. 2255.

The Petitioner entered his guilty plea to Count 14 of a multi count indictment on January 7, 1972 before the Honorable Peter T. Fay being case No. 71-606 CR-PF. The plea was entered after a plea bargain in compliance with the standards set forth by the ABA. The agreement was basically that if the petitioner entered a plea to Count 14 the remaining counts would be dismissed by the government. The government further agreed to recommend that petitioner be given a probationary period of five (5) years and not any incarceration, and the government further agree to recommend that no fine be imposed upon the Petitioner.

The plea was entered per the provisions of the United States Supreme Court decision of Alford v. North Carolina, 400 U.S. 25 (1970).

The two grounds set forth in this petition are:

1. That the plea of guilty was coerced.
2. That the sentence, adjudication and guilty plea were in violation of Rule 11, in that a proper factual foundation had not been laid, as required by law.

As to ground one the Petitioner alleges his plea of guilty "was an involuntary act because of a threat conveyed to Matthews and in the belief that the Trial Judge Peter T. Fay, had conveyed through the prosecuting attorney, to movant's counsels and to movant, information that if the movant was going to trial, the other defendants having taken pleas

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in exchange for [illegible] sentence, that the [illegible] sentence movant, if convicted, to a least ten (10) years in prison'.

This matter came up for hearing before the Honorable Judge Fay on June 13, 1975 and after hearing the subject matter of this present motion recused himself from consideration of this motion to vacate and the petition was sent to the Clerk for reassignment.

This petition was filed June 10, 1975 and the Petitioner states that he did not present this issue to the Court until this date as the first doubt he had that Judge Fay had not made the alleged threatening statement as conveyed to petitioners by the United States Attorney was when the Petitioner read a newspaper article April 24, 1974 and that this doubt was further substantiated because of the interest in justice manifested by Judge Fay during a January 10, 1975 hearing held on Petitioner's motion to terminate his probation.

In weighing the merits of petitioner's claims this Court considered the fact the Petitioner was an able attorney who was admitted to practice before both the Florida Bar and the New York Bar. Upon a close examination of the transcript of the entering of the plea this Court can only determine that it was freely and voluntarily given and the Court received the plea in full compliance with Rule 11 of FRCP and tenants of Alford v. North Carolina. At page 3 of the sentencing transcript it recites the following:

"THE COURT: Within the purview of that case, do you make this decision, though, freely and voluntarily?

MR. MATTHEWS: Yes, I do, Your Honor. I think that I have been treated with great coutesy by counsel.

MR. SONNETT: Thank you."

The above Mr. Sonnett being the same Assistant United States Attorney that Petitioner sets forth in this petition was the person who coerced the plea of guilty through fraud, deceit, trickery and coercion.

In two recent decisions of the Supreme Court of the United States; Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed. 2d 274 (1969); and McCarthy v. United States 394 U.S. 315, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1968) the essense of these decisions being that the sentencing Judge must quiet his doubts regarding the plea, and that a clear record of the proceedings be established. The Supreme Court has not mandated guidelines beyond those imposed by the Federal Rules of Criminal Procedure 11.

There is no claim by the petitioner that a plea bargain was not fulfilled to bring this case within the decision of Santobello v. New York, 1971, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed. 2d 427 or even in a later United States Fifth Circuit Court of Appeals decision Bryan v. United States, 492 F.2d 775 (5th Cir. 1974) an en banc decision which arose from a pro se motion presenting a similar question as the one presented in this petition.

The Court of Appeals said:

> "Bryan had his day in Court on the issue of whether a bargain had been connected with his plea. Both he and his counsel denied that a bargain was involved 'directly or indirectly'. Section 2255 itself proscribes successive motions for similar relief and in the spirit of that bar we hold that record's positive 'no bargain' affirmation precludes the necessity to retry the issue."

In the Bryan case the court clearly stated that it is one thing to consider a silent record and another to consider an issue such as this where the record clearly speaks for itself and the contention of a petitioner raises questions of the involuntariness of a plea. Again in the present case coercion was emphatically denied by petitioner and his attorneys standing with him, the trial court couldn't have given the petitioner more of an opportunity to speak. It is also clear from the record of the taking of the plea and subsequent appearances by the petitioner before the trial judge that the judge was most symphatic to the petitioner and gave him no cause to fear the bringing of any matter before the court.

The question such as raised by this petition was further settled by the courts when in Frank v. United States, 501 F.2d 173 (5th Cir. 1974), the court said:

> ...."Frank, like Bryan, testified without conflict or equivocation that no plea bargain had been made or promised, directly or indirectly.... We find this factor controlling in this appeal, and leave to other cases the determination of prisoner motions in the face of records silent on plea bargaining or indicative of specific motives to disclaim plea bargaining."

From an examination of the record by this court, it is clear that all of the facts brought out in this petition were known to the petitioner at the time of making the plea and that his plea at the time and under the specific facts of this case this course can only conclude that the plea when made was freely and voluntarily made by the petitioner. In Alford, Supra it was held that even if the plea was entered out of a fear of the possibility of a death sentence it would not afford a basis for relief. Parker v. North Carolina, 397 U.S. 790 (1970); Brady v. United States, 397 U.S. 742 (1970).

We now consider Petitioner's second contention, that there was not sufficient factual basis established for the plea. The determination of whether there is a factual basis for a plea of guilty need not rest solely upon evidence presented by the government; certainly the court is permitted to consider the Petitioner's testimony in making this determination.

The transcript of the taking of the plea and establishing factual basis recites the following beginning with page 8:

A. David A. Ross; I am a trial attorney with the Securities and Exchange Commission, Washington, D. C.

Q. Mr. Ross, in connection with your official duties, have you had occasion to conduct an investigation concerning Mr. Matthew's relationship to the State Fire and Casualty Company?

A. Yes.

Q. With regard to Count 14, which charges a securities law violation that occurred on or about January 10, 1968, would you please state the results of your investigation.

A. During the course of our investigation, after reviewing of documents and interviewing of witnesses, we determined that Mr. Matthews caused the mails to be used to distribute a proxy statement to State Fire stockholders on or about January 10, 1968, which statement did not include certain material information regarding activities of Capital Bancshares and people connected with State Fire. This was in connection with a proposal to postpone a recapitalization plan for State Fire.

Q. What was Mr. Matthew's position with State Fire and Casualty Company at the time that proxy went out?

A. Mr. Matthews, our investigation showed, was the general counsel to State Fire, a director, a nominee for director, and I think that was it at the time, or possibly a vice president of State Fire.

Q. Are the factual allegations, as contained in Count 14, those that have been established by your personal investigation, interviews with witnesses, examination of corporate records and other records?

A. Yes.

Mr. Sonnett: We have nothing further at this time, your Honor.

THE COURT: Any cross-examination of this witness?

MR. BLOCK: No, your Honor.

THE COURT: Thank you, sir.

(Thereupon the witness was excused).

THE COURT: Anything else from either party?

MR. SONNETT: Just to clear up the record, I previously announced that at the time of sentencing the Government would dismiss the remaining counts of the indictment.

THE COURT: Yes. That was part of the agreement, as I understand it, and as I wrote it down.

MR. BLOCK: We have nothing further, Your Honor.

The trial court made inquiry factually precise enough to be within the ambit of the charges made against him and without any objections, deletions or additions requested by Petitioner or his attorneys. United States v. Bethony, 489 F.2d 91 (5th Cir. 1974). All parties involved in this matter agreed that to try the case could take weeks if not months and would defeat the motivation for plea bargaining and pleas of guilty. The requirements of the court

is that the inquiry be factual precise enough and sufficiently specific to develop the defendant's conduct on the occasion involved was within the ambit of that defined as a criminal. Jimenez v. United States, 487 F.2d 212, (5th Cir. 1973).

The Petitioner had a hearing before the trial judge on his Petition for Termination of Probation on January 10, 1975 and during that hearing reiterated sufficient occurrences on his part to have established factual basis for his plea and this was still three years after his plea was entered and accepted by the court . At page 20 of his January 1975 hearing petitioner said:

> "Nevertheless, I understand that there were certainly various mistakes that I would not repeat in connection with the case. I would be a lot more suspicious and distrusting of persons for whom I was working and I have learned a good deal from the probationary period and everything that has ensued subsequent to it.
>
> I certainly would never take a job as a director or officer of a company that I knew very little about and as to which I knew practically nothing of the owners, particulary a public company. It's a grave mistake, because you become in a sense, in the sense of the Securities and Exchange Act --- you become responsible as a director and an officer for everything they do.
>
> I recognize that far more fully and clearly than I did then."

The record clearly refutes petitioner's claims that his guilty plea was not entered freely and voluntarily with a full understanding of the nature and consequences thereof. The record clearly establishes that the petitioner understood the nature of the charge, that he entered his plea freely and voluntarily with a full understanding of the plea and there was a factual basis for the plea.

Under these circumstances it is uncessary to require an evidentiary hearing to resolve petitioner's claims. Traber v. United States, 466 F.2d 483 (5th Cir., 1972); Hunter v. United States, 449 F.2d 156 (5th Cir. 1971).

For these reasons, it is

ORDERED AND ADJUDGED that the Motion to Vacate Sentence be and the same is hereby DENIED, and that this cause stands DISMISSED.

DONE AND ORDERED at Miami, Florida, this _____ day of August, 1975.

_____
UNITED STATES DISTRICT JUDGE

cc: Bernard Hunter, Est.
1680 N. E.125th Street,
North Miami, Florida 33181

Lloyd G. Bates, Jr.
Assistant U. S. Attorney
300 Ainsley Building
Miami, Florida

APPENDIX "B"

C. Carey MATTHEWS,
Plaintiff-Appellant,

v.

UNITED STATES of America,
Respondent-Appellee.

No. 75-3497.

United States Court of Appeals,
Fifth Circuit.

June 9, 1976.

Motion was filed to vacate and set aside guilty plea on ground that it was coerced by reason of alleged threat from the trial court that defendant would receive at least a ten-year sentence if he did not plead guilty, which threat allegedly was conveyed by the prosecutor to movant's counsel and through that counsel to movant. The United States District Court for the Southern District of Florida, C. Clyde Atkins, J., denied motion without an evidentiary hearing, and movant appealed. The Court of Appeals, Dyer, Circuit Judge, held that although at time of sentencing movant stated that plea was not induced by any threats or coercion and although his counsel indicated that he had nothing to add to the proceedings, movant was entitled to an evidentiary hearing in view of counsel's sworn affidavit substantiating allegations that threatening statements had been made to him by the prosecutor, sworn affidavit of defendant's law partner stating that he was privy to such conversations and sworn affidavit of prosecutor that he did not make any such statements to counsel.

Reversed and remanded.

1. Criminal Law ⇐997.16(5)

Although at rule 11 colloquy defendant stated that guilty plea was not induced by threats or coercion, defendant was entitled to evidentiary hearing on motion to vacate and set aside plea on ground that it was coerced by reason of alleged threat from trial court that defendant would receive at least a ten-year sentence if he did not plead guilty where petition was supported by counsel's sworn affidavit substantiating allegation that such threatening statements had been made as well as sworn statement of defendant's law partner that the latter was privy to such conversations and sworn affidavit from the prosecutor denying any such statements. Fed.Rules Crim.Proc. rule 11, 18 U.S.C.A.; 28 U.S.C.A. § 2255.

2. Criminal Law ⇐997.16(5)

Allegations of a petitioner accompanied by his own affidavit are insufficient to mandate an evidentiary hearing on a petition to vacate and set aside guilty plea as being involuntary in face of a record, as made at time of guilty plea, detailing statements by petitioner that his plea was not induced by any threats or coercion. Fed.Rules Crim.Proc. rule 11, 18 U.S.C.A.; 28 U.S.C.A. § 2255.

3. Criminal Law ⇐997.11

It is not improper to refer to magistrate for his recommendation petition seeking to vacate and set aside guilty pleas. 28 U.S.C.A. § 2255.

Appeal from the United States District Court for the Southern District of Florida.

Before DYER, SIMPSON and RONEY, Circuit Judges.

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DYER, Circuit Judge:

[1] The sole question before this Court is whether the district court erred when it denied Matthews' motion under 28 U.S.C.A. § 2255 to vacate and set aside his guilty plea without an evidentiary hearing. We conclude that under the particular facts or this case, an evidentiary hearing was required. We therefore reverse and remand.

Matthews was charged with multiple violations of the Securities Act of 1933, and the Securities and Exchange Act of 1934. After initially pleading not guilty to all counts, Matthews withdrew that plea and, pursuant to *Alford v. North Carolina*, 1970, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162, he entered a plea of guilty to one count, notwithstanding his continuing assertions that he was innocent of the charges brought against him. The remaining counts were dismissed.

The Section 2255 petition alleged that Matthews was coerced into entering the guilty plea by reason of a threat conveyed by the Assistant United States Attorney heading the prosecution team to Matthews' counsel,[1] and through that counsel to Matthews. The substance of the allegation related to a private conference between the Assistant United States Attorney and the district judge. Since all other codefendants had entered guilty pleas, and since the trial promised to be long, the district judge is alleged to have stated in this conference that Matthews would receive at least a ten year sentence if he did not enter a guilty plea and was subsequently found guilty by a jury. The petition states that this information was relayed to Matthews' counsel by the Assistant United States Attorney, and by Matthews' counsel to Matthews. Important to the outcome of this case, the petition was supported by a sworn affidavit signed by Matthews' counsel, substantiating the allegation that these statements were made to him by the Assistant United States Attorney. A sworn affidavit was also filed by Matthews' law partner, stating that he was privy to the conversation in which Matthews' counsel related these threats to Matthews. Subsequent to the filing of the petition, the government filed a sworn affidavit signed by the Assistant United States Attorney, stating that he had never had such a private conference with the district judge, and that he had never conveyed these statements to Matthews' counsel.

Faced with these conflicting sworn affidavits, the district court[2] nevertheless denied Matthews' Section 2255 petition without an evidentiary hearing on the basis of this Court's en banc decision in *Bryan v. United States*, 5 Cir. 1974, 492 F.2d 775. The district court noted that at the time of sentencing, a full Rule 11 colloquy took place, and Matthews there stated that his plea was not induced by any threats or coercion. His counsel, the same attorney alleged to have received the threat, was also present at the Rule 11 hearing, and, although not addressed directly by the court, indicated that he had nothing to add to the proceedings. In the view of the district court, *Bryan* precluded Matthews from challenging statements made by him in the plea proceeding so as to gain Section 2255 relief. Since he was bound by those statements, no evidentiary hearing was required, and

1. Matthews is represented on the Section 2255 motion by different counsel.

2. The district judge who received the guilty plea recused himself from consideration of the Section 2255 petition, and the petition was assigned to another judge.

the court could only conclude that his plea was freely and voluntarily entered.

In *Bryan*, this Court en banc drew a balance between the Section 2255 requirement that an evidentiary hearing is necessary unless the motions, files, and records of the case "conclusively show" that the prisoner is entitled to no relief, and the need for finality in the criminal process. As stated in *Bryan*, if a prisoner could challenge prior statements made at a Rule 11 hearing without limit, then

> the number of hearings which a wilful affiant could provoke as to a single conviction would be limitless, for each time he could swear that someone at the last preceding hearing suborned false testimony from him or his lawyer or that the judge played false in the performance of his duties.

492 F.2d at 780. In reaching this balance, the court *did not* conclude that a Section 2255 petition could never challenge statements made at a prior plea proceeding. As this Court has stated:

> We do not view the foreclosure principle set forth in *Bryan* to constitute an absolute and ironclad rule that the "magic words" of the Bryan-Rule 11 examination completely eliminate the necessity for a hearing on a § 2255 motion in all circumstances.

Vandenades v. United States, 5 Cir. 1975, 523 F.2d 1220, 1224. Rather, the Court carefully compared the facts before it to the precepts of the Supreme Court laid down in *Fontaine v. United States*, 1973, 411 U.S. 213, 93 S.Ct. 1461, 36 L.Ed.2d 169, and *Machibroda v. United States*, 1962, 368 U.S. 487, 82 S.Ct. 510, 7 L.Ed.2d 473, both of which required an evidentiary hearing under the "conclusively show" standard of Section 2255. The Court pointed to several characteristics which distinguishes *Bryan* from *Fontaine* and *Machibroda*. First, *Bryan* did not involve allegations of threats or coercion which induced the plea, as in *Fontaine* and *Machibroda*. Second, unlike those two cases, *Bryan* supported the petition with only his own affidavit to counter directly inconsistent former testimony. Thus, *Bryan* is inapposite to the case now before us, where the petition alleges threats which coerced the plea, and where the petition is supported not only by the affidavit of the petitioner, but also by the affidavits of third persons. *See Vandenades, supra*, 523 F.2d at 1224, fn. 6.

[2] Subsequent to *Bryan* we have held that its principles are not limited to situations involving a traditional plea bargain, but that those principles also apply to a Section 2255 petition which alleges that the guilty plea was induced by threats or coercion. In this later situation, under the rationale of *Bryan*, the allegations of the petitioner accompanied by his own affidavit are insufficient to mandate an evidentiary hearing in the face of a Rule 11 record detailing statements by the petitioner that his plea was not induced by any threats or coercion. *United States v. Barrett*, 5 Cir. 1975, 514 F.2d 1241; *Jackson v. United States*, 5 Cir. 1975, 512 F.2d 772.

Subsequent decisions have also held, however, that *Bryan* does not apply to eliminate the requirement of an evidentiary hearing when the petition is supported not only by the allegations of the petitioner, but also by credible third party affidavits or other documentary evidence. *Dugan v. United States*, 5 Cir. 1975, 521 F.2d 231; *Vandenades, supra*.

In *Dugan*, the petition alleged an unkept plea bargain and was supported by affidavits of a county deputy and sheriff, stating that both state and federal officials had made promises to Dugan that he would receive a sentence of only four years. At the plea proceeding, the court questioned Dugan as to whether any promises had been made in connection with the guilty plea, and Dugan replied in the negative. This Court concluded that the existence of the supporting affidavits, rather than the negative response elicited at the plea proceeding, was controlling, and an evidentiary hearing was necessary to resolve Dugan's claim. The rationale of *Bryan* was found to be inapplicable when third party affidavits accompanied the petition:

> While allowing a petitioner to obtain an evidentiary hearing by merely alleging an unkept plea bargain would enable a wilful affiant to provoke as to one conviction endless hearings for each time he could swear that someone at the last hearing suborned false testimony, *such rationale for denying a hearing does not control here.* See *Bryan v. United States*, 492 F.2d at 780. When the petitioner presents affidavits from third parties, the danger of repeated hearings no longer exists. When petitioner goes beyond mere allegations by presenting credible affidavits that raise a substantial inference that an unkept bargain was in fact made, § 2255 requires an evidentiary hearing.

521 F.2d at 233. *See also Vandenades v. United States, supra*, at 1223 ("when the record discloses other credible documentary evidence which indicates a right to relief an evidentiary hearing may be necessary").

The case before us is controlled by *Dugan*. Here, we have affidavits that raise a substantial inference that threats or coercion in fact induced Matthews' guilty plea. Of course, we make no attempt to resolve the conflict in the affidavits before us, nor do we intimate any view as to whether Matthews would be entitled to withdraw his plea if the allegations of his petition are in fact correct. But, as decided in *Dugan*, those affidavits tip the balance drawn by *Bryan*. Matthews is entitled to an evidentiary hearing on his claim.

[3] Matthews also claims that there was an insufficient factual basis for the entry of his *Alford* plea. Further, he challenges the local procedure whereby Section 2255 petitions are referred to the magistrate for his recommendation. We find these assertions of error without merit.

REVERSED AND REMANDED.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

APPENDIX "C"

MR. SONNETT: Neal Sonnett, representing the Government, along with Bruce Wagner, Assistant United States Attorneys.

MR. BLOCK: Irwin Block, for the defendant, C. Carey Matthews.

MR. SONNETT: Your Honor, Mr. Block, on behalf of the defendant Matthews, and the Government have entered into certain plea negotiations. As a result of those plea negotiations, we are willing to announce to the Court that the following agreements have been reached between the Government and the defendant, Carey Matthews.

The agreement is, first, that the defendant Matthews will enter a plea of guilty to Count 14 of the indictment---

MR. BLOCK: 15.

MR. SONNETT: Count 15 of the indictment.

MR. BLOCK: I am sorry. 14.

MR. SONNETT: 14?

MR. BLOCK: Yes.

MR. SONNETT: Will enter a plea of guilty to Count 14 of the indictment.

The Government has agreed that it will at the time of sentencing dismiss the remaining

counts of the indictment against Mr. Matthews.

The Government has agreed that it will join with Mr. Matthews in recommending to the Court that Mr. Matthews be given a probationary period of five years and not incarcerated, and the Government and the defendant have agreed that the Government will recommend that no fine be imposed for Mr. Matthews.

MR. BLOCK: If Your Honor please, we are pleading guilty. I have discussed with the Government and with Mr. Matthews. We are pleading guilty under the provisions of the recent Supreme Court decision of Alford v. North Carolina.

In that regard I have explained that decision to Mr. Matthews so that he would fully understand the nature of it and what the Supreme Court holds.

Mr. Matthews, with the Court's permission, would like to make a very short statement with reference to why he is pleading guilty after I have explained to him the effect of that decision.

THE COURT: Certainly.

MR. MATTHEWS: Your Honor, I am entering a plea of guilty, although I do not believe I have done a criminal act. However, the

circumstances of the case are such, the pressures on me and my family and the expenses of it, that I feel that I have no alternative and I must enter a plea of guilty.

As I say, under that case, Alford v. North Carolina, I am entering a plea of guilty, although I think I have done nothing criminal.

THE COURT: Within the purview of that case, do you make this decision, though, freely and voluntarily?

MR. MATTHEWS: Yes, I do, Your Honor. I think that I have been treated with great courtesy by counsel.

MR. SONNETT: Thank you.

THE COURT: You recognize, of course, the fact that you are entering a plea of guilty to the charges contained in this count?

MR. MATTHEWS: Yes, I do, Your Honor.

THE COURT: For the reasons, as I say, that you have stated, but nevertheless it is a legal plea of guilty to those charges.

MR. MATTHEWS: I understand.

THE COURT: Well, in order that the record will be complete, and I suppose out of an abundance of caution, Mr. Matthews, and not to

impose on you, let me cover with you the routine questions that I think I probably should ask, even though I know you and know of you.

MR. MATTHEWS: Yes, sir.

THE COURT: And know that you are an attorney.

However, of course, you recognize that for whatever reason you are entering the guilty plea, that you are waiving many of your legal rights.

MR. MATTHEWS: I understand that.

THE COURT: You know, of course, that you are entitled to stand on your not guilty plea.

MR. MATTHEWS: I understand.

THE COURT: That you would be entitled to a jury trial if you requested the same.

MR. MATTHEWS: I understand.

THE COURT: And that all twelve of the jurors would have to agree before you could be found guilty.

MR. MATTHEWS: I understand.

THE COURT: That the law presumes you to be completely innocent unless and until the Government is able to establish your guilt beyond all reasonable doubt.

MR. MATTHEWS: I understand.

THE COURT: That the burden is on the Government to call the witnesses, to introduce the evidence and to establish this guilt.

MR. MATTHEWS: I understand, Your Honor.

THE COURT: That you have no burden at all. You may cross-examine any witnesses called by the Government. You could certainly call witnesses in your own behalf and even testify in your own behalf, but there is no requirement that you do so.

MR. MATTHEWS: I understand, sir.

THE COURT: Other than the agreements that have been announced by the United States Attorney and agreed to obviously by you and by your attorney, are there any other promises or coercion or force or anything that has been placed upon you to induce you to enter this guilty plea?

MR. MATTHEWS: No, sir.

THE COURT: As I say, for whatever reasons, it is a free and voluntary decision on your part?

MR. MATTHEWS: Yes, it is, Your Honor. I explained in my preamble my reasons, and it is free and voluntary on my part.

THE COURT: Is there anything else that either of you feel that I should inquire of Mr. Matthews regarding this tendered plea?

MR. SONNETT: Other than your statement, Mr. Matthews, have you received any threats or coercion from any government agency in order to induce you to make this plea?

MR. MATTHEWS: No, I have not.

MR. SONNETT: In all respects, the plea is voluntary on your part?

MR. MATTHEWS: Yes, it is.

MR. SONNETT: Nothing further, Your Honor.

MR. BLOCK: I have nothing further, Your Honor.

THE COURT: Does the Government desire to establish a factual basis?

MR. SONNETT: Yes, sir.

THEREUPON--

DAVID A. ROSS

was called as a witness on behalf of the Government and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SONNETT:

Q State your full name and your

occupation.

A David A. Ross; I am a trial attorney with the Securities and Exchange Commission, Washington, D.C.

Q Mr. Ross, in connection with your official duties, have you had occasion to conduct an investigation concerning Mr. Matthews' relationship to the State Fire and Casualty Company?

A Yes.

Q Was that investigation the subject that led to the indictment now being considered against Mr. Matthews?

A Yes.

Q With regard to Count 14, which charges a securities law violation that occurred on or about January 10, 1968, would you please state the results of your investigation.

A During the course of our investigation, after reviewing of documents and interviewing of witnesses, we determined that Mr. Matthews caused the mails to be used to distribute a proxy statement to State Fire stockholders on or about January 10, 1968, which statement did not include certain material information regarding activities of Capital Bancshares and people connected with State Fire.

This is in connection with a proposal to postpone a recapitalization plan for State Fire.

Q What was Mr. Matthews' position with State Fire and Casualty Company at the time that proxy went out?

A Mr. Matthews, our investigation showed, was the general counsel to State Fire, a director, a nominee for director, and I think that was it at the time, or possibly a vice president of State Fire.

Q Are the factual allegations, as contained in Count 14, those that have been established by your personal investigation, interviews with witnesses, examination of corporate records and other records?

A Yes.

MR. SONNETT: We have nothing further at this time, Your Honor.

THE COURT: Any cross-examination of this witness?

MR. BLOCK: No, Your Honor.

THE COURT: Thank you, sir.

(Thereupon the witness was excused.)

THE COURT: Anything else from either

APPENDIX "D"

RECEIVED AUG 1976

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U. S. COURT OF APPEALS
FILED
AUG 6 1976
EDWARD W. WADSWORTH
CLERK

No. 75-3497

C. CAREY MATTHEWS,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

- - - - -
Appeal from the United States District Court for the
Southern District of Florida
- - - - -

ON PETITIONS FOR REHEARING

(AUGUST 6 , 1976)

Before DYER, SIMPSON and RONEY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above entitled and numbered cause be and the same are hereby Denied

Form 703-3

APPENDIX "E"

WALL STREET JOURNAL APRIL 24, 1974

Under the Gun

As Feds Closed In, Promoter Closed Deal With Top Nixon Aide

Mort Zimmerman Bought LaRue Family Business, Put LaRues on Payroll

Did Prosecutors Go Easy?

By JONATHAN KWITNY
Staff Reporter of
The Wall Street Journal

From 1969 to 1972, S. Mort Zimmerman of Dallas, Texas, may have been the nation's most investigated businessman.

He or some of his corporate enterprises were indicted, enjoined, delisted, suspended or fined by courts, enforcement agencies and a stock exchange. But in January 1972, he struck a bargain with the Justice Department and pleaded guilty to a few of the criminal charges against him.

To the consternation of agents from the Securities and Exchange Commission, the Federal Bureau of Investigation, the Comptroller of the Currency's office, the Postal Service and various state agencies, Mr. Zimmerman never went to prison. Now, a few investigators are beginning to think that somebody pulled strings on Mr. Zimmerman's behalf.

Their evidence—based on matching old SEC files with developments in the Watergate scandal—is only circumstantial. And one SEC man thinks that Mr. Zimmerman may have got off merely because a federal prosecutor was willing to deal with Mr. Zimmerman in return for evidence that would convict another man and better enhance the prosecutor's political ambitions. Mr. Zimmerman himself says he avoided jail fair and square, largely because his violations were only technical.

Still, the evidence solidly links Mr. Zimmerman in a multimillion-dollar deal with Fred C. LaRue and members of his family.

On Mr. Zimmerman's Payroll

Mr. LaRue, as a top aide to Nixon campaign chief John Mitchell, his chief political mentor since 1968, performed duties that included such delicate chores as helping to destroy incriminating evidence and to deliver "hush money" to Watergate burglars, for which he pleaded guilty to conspiracy to obstruct justice. Earlier, as a high-level consultant to President Nixon, Mr. LaRue was unsalaried. But he by no means went uncompensated. While he worked for the President, and while investigators from many agencies were closing in on Mr. Zimmerman, Mr. LaRue, his brother and his brother-in-law were drawing $100,000 a year from a company controlled by Mr. Zimmerman. The LaRue group had a large stock interest in the company. And Mr. Zimmerman, through stock purchases and a big bank loan, funneled them additional chunks of cash.

The LaRue group got into this position through the sale of its debt-ridden family concern. Larco Drilling Corp. to Mr. Zimmerman's Capital General Corp. (then Capital Bancshares Inc.) in April 1968. The investigations of Mr. Zimmerman had been intensifying for nearly a year by that time. Larco, a Gulf

Coast oil and gas firm, had been founded by Fred LaRue's father, I. P. LaRue, Sr., who was accidentally shot to death by Fred LaRue in a hunting mishap. By 1969 Larco was owned by Fred LaRue; his brother, I. P. (Ike) LaRue Jr., and Fred LaRue's brother-in-law, Harry Owen.

At the time they sold it to Capital General, Larco's assets were valued at $3,700,493 (including a $390,000 loan to Messrs. LaRue and Owen), its liabilities at $3,753,335. Mr. LaRue says the deficit may have resulted from valuing the assets (mainly drilling equipment and some oil property) at cost rather than market value, though he says that he isn't sure now. In any case, Mr. Zimmerman's Capital General gave the LaRue family 22,085 shares of Capital General, worth nearly $2 million based on their $9-a-share bid price in the over-the-counter market, in return for Larco.

A $750,000 Loan: Easy Terms

But in a complex fashion characteristic of many of his business deals, Mr. Zimmerman sweetened the pot considerably for the LaRue family. He arranged with his banker, Roger B. Mize, to let Mr. LaRue and his relatives borrow $750,000 from a Texas bank of which Mr. Mize was chairman. A Capital General subsidiary bought $350,000 in certificates of deposit from two other banks with which Mr. Mize was associated to induce the loan. Collateral of 82,500 shares of Capital General was put up, presumably by the LaRue family, though records and memories now are unclear on the subject. Still, Capital General was committed to repay the loan if the LaRue family didn't.

Of the $750,000 the LaRue family members were permitted to borrow they used $390,000 to repay the money Messrs. LaRue and Owen had borrowed from Larco. They lent Larco another $200,000. They kept the remaining $160,000, Mr. LaRue says.

Finally, Capital General agreed to employ Mr. LaRue and his relatives for a total of $100,000 a year, to be divided as they chose, and to issue them stock options, which never were exercised because the price on Capital General stock fell. Mr. LaRue became president of Capital General's new Larco subsidiary.

Troubles, but a Pay Raise

The deal looked good at first. Then it soured. By March 1970, the price on Capital General stock had fallen to $3 or $3.50 a share. The LaRues' Capital General shares, once worth about $2 million, then were worth no more than $677,000, although their bank loan had been reduced $200,000 by installments paid by Capital General under the original agreement.

Despite his own troubles, Mr. Zimmerman stepped in and had Capital General offer to buy back for $750,000, or $12.50 a share, the 62,500 Capital General shares still held by the bank as collateral for the LaRues' loan. This offer, had it been carried out, would have more than repaid the LaRues' remaining debt. While the LaRues considered this offer, Capital General also offered to upgrade the dwindling value of the LaRues' loan collateral by adding stock in Capital General subsidiaries. And Capital General offered to raise to $160,000 a year from $100,000 the compensation to the LaRues.

Throughout this 1969-70 period, Mr. Zimmerman was in trouble. The same month he made the Larco deal, State Fire & Casualty Co., a Miami-based insurer that had been a subsidiary of Capital General until 10 months earlier, went bankrupt. It folded after a complicated deal involving Mr. Zimmerman and Edward Wuensche, who had been convicted of fencing stolen stock and who had detailed his Mafia ties in congressional testimony. The deal resulted in State Fire's valuable assets being replaced by worthless

securities. During the 18 months Mr. Zimmerman controlled State Fire, he transferred $1.5 million of its liquid assets to Capital General in exchange for stock in a Capital General subsidiary. He took back this stock when he sold State Fire and arranged for Wuensche to replace it with securities that turned out to be worthless. Besides setting the stage for State Fire's bankruptcy, this brought the investigators down on Mr. Zimmerman.

He faced other setbacks. The Comptroller's office was pressuring him to yield control of a chain of banks that Capital General owned. Their questionable loans allegedly had created big losses. Mr. Zimmerman had contracted to sell his flagship bank, Capital National of Miami. But the Comptroller's office was unhappy because the chosen buyer was a Netherlands Antilles-based mutual fund run by Allen Lefferdink, a controversial offshore-fund promoter whose Colorado financial empire had been brought down already by the SEC.

In April 1969, the same month he made the Larco deal, Mr. Zimmerman's Capital General sold control of its Underwriters Trust Co., New York. Later, in testimony at a congressional hearing, it was disclosed that under Mr. Zimmerman's control, Underwriters Trust had accepted as loan collateral more than $1 million in stolen securities.

And also about the time of the Larco deal, the insurance departments of Florida and Arkansas, along with the U.S. Postal Service, were contemplating action against Mr. Zimmerman over the bankruptcy of North American Guaranty Insurance Co., Little Rock. Some 16,000 policyholders had been stripped of their protection when North American's assets evaporated during a stock swap involving Capital General.

The American Stock Exchange and the SEC were keeping a close eye on Mr. Zimmerman's Intercontinental Industries conglomerate because of the involvement of a prominent Mafia figure, Michael "Big Mike" Polizzi. Later, in the summer of 1969, the Amex and the SEC accused Intercontinental of issuing false publicity releases. Mr. Zimmerman consented to a civil-court injunction against fraud. Trading in the stock was suspended in June 1969. The Justice Department, which handles criminal prosecutions for federal investigative agencies, was beginning a probe into Mr. Zimmerman's affairs.

White House Pass

Throughout this period—the spring and summer of 1969—and, in fact, up until early egory of special projects." A wealthy Mississippian and longtime Republican leader, Mr. LaRue had contributed early to Mr. Nixon's 1968 campaign and became a top aide to John Mitchell, who ran the campaign. After the 1968 election, Mr. LaRue went to work directly for the President, and Mr. Mitchell, of course, became Attorney General.

Though Mr. LaRue wasn't a full-time employe of the President's, he had a White House pass, and he was supposed to be available at all times for assignment. According to a White House spokesman, the only comparable post under Mr. Nixon was that held by former Treasury Secretary John Connally when he returned to Washington last year to assist the President. But Mr. Connally, unlike Mr. LaRue, was barred from outside work while he served as special consultant.

(Early in 1972, Mr. LaRue left the White House to work under Mr. Mitchell again in the Nixon campaign. This work led him into the Watergate cover-up. He pleaded guilty on June 27, 1973, to conspiracy to obstruct justice. Sentencing has been delayed until he completes his testimony against other defendants.)

Mr. Zimmerman's connection with a top Nixon strategist, whatever other value it may have had, did little to stop

the downhill side of his business ventures. And Capital General's stock plummeted. On Sept. 15, 1970, a year and a half after the Larco deal, it hit $1.75 bid. On that date the LaRues ended their employment agreement with $180,000 having been paid. But Larco, still a Capital General subsidiary, bought back from them 18,634 shares of Capital General stock at $6 a share, for a total of $111,804, to cover debts the LaRues had incurred, and Larco agreed to buy back from the family another 105,000 shares at $6 in installments. Also, the LaRue group was released from all liability for the $750,000 bank loan. Capital General stock continued to fall in the open market, hitting $1 bid on Nov. 19.

"Washington Pulled the String"

Mr. Zimmerman's legal troubles were coming to a head, too. On April 30, 1971, he and four associates were indicted by a federal grand jury in Miami on 19 counts of mail and securities fraud involving Capital General's looting of State Fire. In December 1971 the grand jury added a charge that Mr. Zimmerman attempted to bribe an assistant U.S. attorney with $40,000 to win dismissal of the first indictment.

A month later, investigators were shocked to learn that Mr. Zimmerman had negotiated a high-level Justice Department deal. He was allowed to plead guilty to four counts, for which he was fined $30,000, put on probation and given immunity from all other charges. The deal took place in January 1972, when Messrs. Mitchell and LaRue were preparing to move from the Justice Department and the White House, respectively, to the Committee to Re-Elect the President. The arrangement was made by Assistant U.S. Attorney Neil Sonnett in Miami, but it was overseen by Robert Hickey, supervisor of the criminal fraud section of the Justice Department in Washington.

Mr. Hickey flew to Miami for the negotiations. He and Mr. Sonnett agreed to let Mr. Zimmerman plead guilty to the handful of charges in return for a light sentence and dismissal of the other charges.

"Somebody in Washington pulled the string on us," says Kathryn Gregory, a lawyer who recently retired as an official of the Florida Insurance Department. "I think it had to be through LaRue. We spent years working on that case." Irving Bober, another attorney for the department, also cites the LaRue connection as a factor in Mr. Zimmerman's probation. "It was a Washington deal," he says. "My best judgment is that everybody knew what was going on down here (in Florida)," he says.

Was Society Cheated?

In Washington, the Justice Department declines to comment, but some individuals involved dispute any suggestion that Mr. LaRue influenced the settlement. Mr. Sonnett, now a Miami attorney, says he had to persuade the Justice Department to agree to it. He says he considered it simply on its merits.

David Ross, an SEC attorney, protested the settlement. But he says he thinks the LaRue connection had nothing to do with it. He says it came about because Mr. Zimmerman had promised to testify against a co-defendant, Carey Matthews, a prominent Florida legislator, against whom evidence was weak. He says that Mr. Sonnett, the assistant U.S. attorney in Miami, was more interested in convicting a local politician—Mr. Matthews—because Mr. Sonnett was about to quit his job to run for state office and the Matthews' conviction would be a feather in his cap. Mr. Sonnett did quit to seek the Democratic nomination for state attorney in Dade County—as I lost; he says the handling of the Zimmerman case had nothing to do with his political aims. And Mr. Ross says higher officials in the Justice Department, rather than wanting to let Mr. Zimmerman get off, had preferred a two-year jail sentence.

But the federal judge in the case, Peter Fay, was uneasy about the settlement. "I was very upset about the plea bargaining procedure because it made the court into a rubber stamp," he says. If the defendants were guilty of all the charges, he said at the time, "our judicial system and society have been cheated." Judge Fay says he went along with the agreement made by the prosecutors because Mr. Zimmerman and his codefendants had exposed themselves by offering evidence and otherwise living up to their end of the deal. He says he didn't learn about the LaRue connection until long afterward.

Mr. Zimmerman is coy about the LaRue connection. "He knew I had problems with the government," he says of Mr. LaRue. "He knew they were fishing around my office for everything they could find. I always told him I am a man who likes to meet with people, anybody in government. I never had the opportunity. I think he might have discussed it with people he knows, but I never talked (to them)."

The LaRues Get Out

Mr. LaRue doesn't exactly remember it that way. "I don't recall him ever bringing the subject up," Mr. LaRue says, "and I wouldn't have (interceded) anyway."

(However, a former FBI agent, William F. Higgins Jr., says he suspects that the Larco deal may have influenced orders he got to stop investigating a Cleveland businessman with close ties to Mr. Zimmerman. The agent was fired from the FBI after he kept probing for fraud in several large bankruptcies involving the businessman. The Justice Department says Mr. Higgins SEC civil fraud injunctions in the case, and he is suing for reinstatement.)

Mr. Zimmerman pleaded guilty in January 1972. In the same month, Capital General sold all the noncash assets of Larco to Transcontinental Oil Corp., a New Orleans-based firm, for 225,000 shares of Transcontinental stock, then worth about $540,000, and $2.5 million in notes. The shares since have risen to about $1.2 million, but most of the stock and notes went into an escrow account to pay off Larco creditors, says R.A. Oxenreiter, vice president of Transcontinental Oil. "When we bought (Larco), it was for all practical purposes bankrupt," he says.

A few months later, on April 12, 1972, Capital General turned over to Mr. LaRue and his relatives 25,000 shares of Transcontinental Oil. The family, in turn, agreed to return 6,000 shares of their remaining holding in Capital General, releasing them from all remaining debts and obligations under the original deal. By that time, the $750,000 loan to the family by Mr. Mize's bank had been paid down to $433,215.64 by Capital General. Mr. Zimmerman says he doesn't know exactly how the loan stands now.

APPENDIX "F"

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 71-606-CR-PF

UNITED STATES OF AMERICA,)
Plaintiff,)
-vs-) AFFIDAVIT
C. CAREY MATTHEWS,)
Defendant.)

STATE OF FLORIDA)
) SS
COUNTY OF DADE)

BEFORE ME, the undersigned authority, personally appeared PHILIP J. MANDINA, who, after being first duly cautioned and sworn, deposes and says:

I am an attorney, a member of the Florida Bar, with offices located at 1710 South Bayshore Drive, Miami, Florida.

That during the approximate period 1965 through January 1972, I was a member of a law partnership with C. Carey Matthews.

On or about October 13, 1971, Mr. Matthews was indicted, along with three other parties, in a case filed in the District Court of the United States for the Southern District of Florida, Case No. 71-606,CR-PF, charging him and the other parties with certain violations of the Securities and Exchange Acts of 1933 and 1934.

The aforesaid charges arose out of Mr. Matthews accepting a commitment in January 1968 to serve as general counsel of the State Fire and Casualty Company, Miami, Florida. Said company was in financial straits which eventually resulted in its liquidation by the Florida Insurance Department.

During this period of time, our firm also served as

defense counsel, defending various liquidated suits involving the assureds of State Fire.

At the request of the President of the company, we also moved our law offices and subleased space in a building leased to State Fire and Casualty Company, however, our firm maintained separate offices in that building.

As defense counsel to represent him in the aforesaid trial, Mr. Matthews retained Irwin Block, Esquire, distinguished member of the Florida Bar with offices in Miami, and subsequent president of the Dade County Bar Association.

The indictment in question basically accused the Defendants of conspiring to violate the Securities and Exchange Acts aforementioned, and the Rules and Regulations of the Securities Exchange Commission in various ways designed to defraud the company and its assets.

Mr. Matthews served as general counsel and as an officer and director for a period of seven months, resigning on July 23, 1968. The company continued its business until April of 1969 when it was placed in liquidation. During the approximate seven months of Mr. Matthews connection with State Fire, he was absent for the best part of January and June in two separate special sessions of the Florida Legislature of which he was a member. He did not have an office with State Fire but his office was located with our law firm, and I know of my own knowledge that he conspired with no one to defraud State Fire, or to violate the laws and regulations pertaining to the Securities and Exchange Commission.

The trial in the Southern District of Florida was scheduled to come before Judge Peter Fay on or about January 10, 1972. Several days before the trial date, Mr. Matthews and I were in our law office discussing the forthcoming trial and going over the exhibits in readiness for said trial. All of the

other defendants had plead guilty to certain counts of the indictment after plea bargaining and had received favorable treatment from the United States Attorney in connection with the pleas. It was clear to us that certain defendants, in particular Benjamin Dobson, the President of State Fire, were not willing to discuss the case and their testimony with our counsel, Mr. Block, or with us, although up until a few days before trial, Dobson had stated that he was prepared to testify to the truth that Mr. Matthews was not involved in any way with any conspiracy in connection with State Fire.

Suddenly, Dobson refused to return our phone calls and Mr. Block, Mr. Matthews' attorney, called this to the attention of the court by motion for continuance. This motion was denied.

On the day in question, which I believe was January 7, 1972, as Mr. Matthews and I were discussing the case in our law office, we received a call from Irwin Block, Mr. Matthews' counsel. Mr. Block requested that both of us get on the phone on different extensions as he had important information to convey.

Mr. Block stated to Mr. Matthews and to me that he had just come from a discussion with Mr. Neal Sonnett, the Chief of the Crimes Division, United States Attorney's Office in Miami, concerning Mr. Matthews' entering a plea of guilty to at least one count of the 19 count indictment. Several such discussions had been held at prior times during the week by Mr. Block and Mr. Sonnett, but Mr. Matthews had told me and we agreed that he was going to go to trial on the case no matter what the other defendants did or what pressures were brought upon them to bring false testimony against him.

Mr. Matthews with me on the telephone on these prior occasions when Mr. Block had reported the discussions with Mr. Sonnett to us, had indicated to Mr. Block that he was ready to go to trial and wanted a trial despite whatever pressures the government could bring on the witnesses.

In this final telephone conversation, which I believe was on January 7th, Mr. Block was considerably upset and related to us that Mr. Sonnett had just advised him that he had just left the office of Judge Peter Fay, the trial judge, who had discussed with him the forthcoming trial date and the fact that Mr. Matthews was to be the only defendant. Sonnett related that the Judge was upset about the possibilities of a trial lasting several months and that the Judge had conveyed to him that the message should be made known to Mr. Matthews and his counsel that in the event of conviction of ~~some~~ any of the counts of the 19 count information, he would impose upon Mr. Matthews a ten-year sentence to the Federal Penitentiary. Block, myself and Mr. Matthews were stunned at this statement.

Matthews said to me, "This is hard to believe, but I can't believe that the Chief of the Crimes Division would risk deliberately lying about a threat like this from the judge. I have to believe it's true."

After further discussion, Mr. Matthews said to me, "This is a terrible threat to put on a man with three children, a one-year old, three-year old and four-year old. What would ever become of them? I can't afford to take a chance on a conviction and a ten-year sentence, especially with a threat like this. For my family's sake, I really have no alternative."

Mr. Matthews then agreed to meet with Irwin Block to enter a plea of guilty to a single count of the indictment pending against him, Count 14.

As to Count 14 of the indictment; it pertained to a violation of certain regulations of the Securities and Exchange Commission and Act in causing to be mailed certain proxy statements containing misleading information or omitting to state information which should have been placed in the proxy statements.

Actually, I know as a matter of fact that the proxy statement in question was not prepared by Mr. Matthews, ~~but~~ it was prepared ~~prior to Mr. Matthews becoming general~~ counsel by

Norman Leibling, a Chicago, Illinois attorney and outgoing general counsel of State Fire. Neither Mr. Matthews nor our office participated in any way in the distribution or disseminating of the proxy statement,which was done by State Fire and Casualty Company itself.

I know of my own personal knowledge from the discussions with Mr. Block on January 7th, as hereinabove related, and thereafter with Mr. Matthews, that Mr. Matthews would never have entered a plea of guilty of any count of the indictment, as he was innocent of all counts thereof, and only did so on the alleged direct threat relayed by Assistant United States Attorney Neal Sonnett to Irwin Block, Mr. Matthews' attorney, and thus to Mr. Matthews, that a ten-year sentence awaited him if convicted. For family reasons as above stated, he sacrificed his political and legal future. An injustice has been done here and should be righted.

FURTHER AFFIANT SAYETH NOT.

Philip J. Mandina

SWORN to and SUBSCRIBED before me

this 10 day of June, 1975.

Fionna J. Wallace
NOTARY PUBLIC, State of Florida at Large

My Commission expires:

Notary Public, State of Florida at Large
My Commission Expires Feb. 18, 1976
Bonded by American Fire & Casualty Co.

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APPENDIX "G"

STATE OF FLORIDA

COUNTY OF DADE

Before me, the undersigned authority, personally appeared IRWIN J. BLOCK, who, being by me first duly sworn, did depose and say:

1. In 1971 and in January of 1972, he was representing Carey Matthews in connection with a case pending in the United States District Court before the Honorable Peter T. Fay, United States District Judge, involving Carey Matthews and other defendants.

2. On the eve of trial, the undersigned was contacted by Neal Sonnett, Assistant United States Attorney, and to the best of undersigned's knowledge,advised that the Court had indicated to him, Mr. Sonnett, that if Carey Matthews went to trial and was found guilty, he would be sentenced to a substantial term of years, the exact number of which Affiant does not remember today, but which he believes to be in excess of ten years.

3. Your Affiant immediately conveyed this information to Carey Matthews who, thereafter decided to plead guilty, rather than take the chance of being sentenced to the time indicated by the Assistant United States Attorney.

Further, Affiant saith not.

IRWIN J. BLOCK

Sworn to and subscribed before me

this 11th day of June, 1975.

NOTARY PUBLIC STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES MAR. 9, 1977
BONDED THRU GENERAL INSURANCE UNDERWRITERS

28

FINE JACOBSON BLOCK & SEMET, P.A.

27

A-31

Supreme Court, U. S.
FILED
NOV 11 1976
MICHAEL RODAK, JR., CLERK

in the

Supreme Court of the United States

October Term, 1976

No. 76-629

C. CAREY MATTHEWS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL APPENDIX

LAW OFFICES OF
LEO GREENFIELD, P.A.
Attorneys for Petitioner
1680 N.E. 135th Street
North Miami, Florida 33181

FLORIDA FINANCIAL PRINTING, INC. — 758-1782

APPENDIX "A"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 75-1134 CIV-CA

FILED
AUGUST 5, 1975

JOSEPH I. BOGART, CLERK
U.S. DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI, FLORIDA

UNITED STATES OF AMERICA,
Plaintiff,

vs.

C. CAREY MATTHEWS,
Defendant.

ORDER OF DISMISSAL

Petitioner, C. Carey Matthews has filed this Motion to Vacate and set aside sentence and adjudication and guilty plea pursuant to 28 U.S.C. 2255.

The Petitioner entered his guilty plea to Count 14 of a multi count indictment on January 7, 1972 before

the Honorable Peter T. Fay being case No. 71-606 CR-PF. The plea was entered after a plea bargain in compliance with the standards set forth by the ABA. The agreement was basically that if the petitioner entered a plea to Count 14 the remaining counts would be dismissed by the government. The government further agreed to recommend that petitioner be given a probationary period of five (5) years and not any incarceration, and the government further agree to recommend that no fine be imposed upon the Petitioner.

The plea was entered per the provisions of the United States Supreme Court decision of *Alford v. North Carolina,* 400 U.S. 25 (1970).

The two grounds set forth in this petition are:

1. That the plea of guilty was coerced.

2. That the sentence, adjudication and guilty plea were in violation of Rule 11, in that a proper factual foundation had not been laid, as required by law.

As to ground one the Petitioner alleges his plea of guilty "was an involuntary act because of a threat conveyed to Matthews and in the belief that the Trial Judge Peter T. Fay, had conveyed through the prosecuting attorney, to movant's counsels and to movant, information that if the movant was going to trial, the other defendants having taken pleas in exchange for favorable sentences, that the said Judge 'would sentence movant, if convicted, to at least ten (10) years in prison.

This matter came up for hearing before the Honorable Judge Fay on June 13, 1975 and after hearing the subject matter of this present motion recused himself from consideration of this motion to vacate and the petition was sent to the Clerk for reassignment.

This petition was filed June 10, 1975 and the Petitioner states that he did not present this issue to the Court until this date as the first doubt he had that Judge Fay had not made the alleged threatening statement as conveyed to petitioners by the United States Attorney was when the Petitioner read a newspaper article April 24, 1974 and that this doubt was further substantiated because of the interest in justice manifested by Judge Fay during a January 10, 1975 hearing held on Petitioner's motion to terminate his probation.

In weighing the merits of petitioner's claims this Court considered the fact the Petitioner was an able attorney who was admitted to practice before both the Florida Bar and the New York Bar. Upon a close examination of the transcript of the entering of the plea this Court can only determine that it was freely and voluntarily given and the Court received the plea in full compliance with Rule 11 of FRCP and tenants of *Alford v. North Carolina.* At page 3 of the sentencing transcript it recites the following:

"THE COURT: Within the purview of that case, do you make this decision, though, freely and voluntarily?

MR. MATTHEWS: Yes, I do, Your Honor. I think that I have been treated with great courtesy by counsel.

MR. SONNETT: Thank you."

The above Mr. Sonnett being the same Assistant United States Attorney that Petitioner sets forth in this petition was the person who coerced the plea of guilty through fraud, deceit, trickery and coercion.

In two recent decisions of the Supreme Court of the United States; *Boykin v. Alabama,* 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed. 2d 274 (1969); and *McCarthy v. United States* 394 U.S. 315, 89 S.Ct. 1166, 22 L.Ed. 2d 418 (1968) the essence of these decisions being that the sentencing Judge must quiet his doubts regarding the plea, and that a clear record of the proceedings be established. The Supreme Court has not mandated guidelines beyond those imposed by the Federal Rules of Criminal Procedure 11.

There is no claim by the petitioner that a plea bargain was not fulfilled to bring this case within the decision of *Santobello v. New York,* 1971, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed. 2d 427 or even in a later United States Fifth Circuit Court of Appeals decision *Bryan v. United States,* 492 F.2d 775 (5th Cir. 1974) an en banc decision which arose from a pro se motion presenting a similar question as the one presented in this petition.

The Court of Appeals said:

> "Bryan had his day in Court on the issue of whether a bargain had been connected with his plea. Both he and his counsel denied that a bargain was involved 'directly or indirectly'. Section 2255 itself proscribes successive motions for similar relief and in the spirit of that bar we hold that record's positive 'no bargain'

> affirmation precludes the necessity to retry the issue."

In the Bryan case the court clearly stated that it is one thing to consider a silent record and another to consider an issue such as this where the record clearly speaks for itself and the contention of a petitioner raises questions of the involuntariness of a plea. Again in the present case coercion was emphatically denied by petitioner and his attorneys standing with him, the trial court couldn't have given the petitioner more of an opportunity to speak. It is also clear from the record of the taking of the plea and subsequent appearances by the petitioner before the trial judge that the judge was most symphatic to the petitioner and gave him no cause to fear the bringing of any matter before the court.

The question such as raised by this petition was further settled by the courts when in *Frank v. United States,* 501 F.2d 173 (5th Cir. 1974), the court said:

> . . . . "Frank, like Bryan, testified without conflict or equivocation that no plea bargain had been made or promised, directly or indirectly . . . . We find this factor controlling in this appeal, and leave to other cases the determination of prisoner motions in the face of records silent on plea bargaining or indicative of specific motives to disclaim plea bargaining."

From an examination of the record by this court, it is clear that all of the facts brought out in this petition were known to the petitioner at the time of making the plea and that his plea at the time and under the specific facts of this case this course can only conclude that the

plea when made was freely and voluntarily made by the petitioner. In Alford, *Supra* it was held that even if the plea was entered out of a fear of the possibility of a death sentence it would not afford a basis for relief. *Parker v. North Carolina*, 397 U.S. 790 (1970); *Brady v. United States*, 397 U.S. 742 (1970).

We now consider Petitioner's second contention, that there was not sufficient factual basis established for the plea. The determination of whether there is a factual basis for a plea of guilty need not rest solely upon evidence presented by the government; certainly the court is permitted to consider the Petitioner's testimony in making this determination.

The transcript of the taking of the plea and establishing factual basis recites the following beginning with page 8:

A. David A. Ross; I am a trial attorney with the Securities and Exchange Commission, Washington, D.C.

Q. Mr. Ross, in connection with your official duties, have you had occasion to conduct an investigation concerning Mr. Matthew's relationship to the State Fire and Casualty Company?

A. Yes.

Q. With regard to Count 14, which charges a securities law violation that occurred on or about January 10, 1968, would you please state the results of your investigation.

A. During the course of our investigation, after reviewing of documents and interviewing of witnesses, we determined that Mr. Matthews caused the mails to be used to distribute a proxy statement to State Fire stockholders on or about January 10, 1968, which statement did not include certain material information regarding activities of Capital Bancshares and people connected with State Fire. This was in connection with a proposal to postpone a recapitalization plan for State Fire.

Q. What was Mr. Matthew's position with State Fire and Casualty Company at the time that proxy went out?

A. Mr. Matthews, our investigation showed, was the general counsel to State Fire, a director, a nominee for director, and I think that was it at the time, or possibly a vice president of State Fire.

Q. Are the factual allegations, as contained in Count 14, those that have been established by your personal investigation, interviews with witnesses, examination of corporate records and other records?

A. Yes.

Mr. Sonnett: We have nothing further at this time, your Honor.

THE COURT: Any cross-examination of this witness?

MR. BLOCK: No, your Honor.

THE COURT: Thank you, sir.

(Thereupon the witness was excused).

THE COURT: Anything else from either party?

MR. SONNETT: Just to clear up the record, I previously announced that at the time of sentencing the Government would dismiss the remaining counts of the indictment.

THE COURT: Yes. That was part of the agreement, as I understand it, and as I wrote it down.

MR. BLOCK: We have nothing further, Your Honor.

The trial court made inquiry factually precise enough to be within the ambit of the charges made against him and without any objections, deletions or additions requested by Petitioner or his attorneys. *United States v. Bethony,* 489 F.2d 91 (5th Cir. 1974). All parties involved in this matter agreed that to try the case could take weeks if not months and would defeat the motivation for plea bargaining and pleas of guilty. The requirements of the court is that the inquiry be factual precise enough and sufficiently specific to develop the defendant's conduct on the occasion involved was within the ambit of that defined as a criminal. *Jimenez v. United States,* 487 F.2d 212, (5th Cir. 1973).

The Petitioner had a hearing before the trial judge on his Petition for Termination of Probation on January 10, 1975 and during that hearing reiterated sufficient occurrences on his part to have established factual basis for his plea and this was still three years after his plea was entered and accepted by the court. At page 20 of his January 1975 hearing petitioner said:

> "Nevertheless, I understand that there were certainly various mistakes that I would not repeat in connection with the case. I would be a lot more suspicious and distrusting of persons for whom I was working and I have learned a good deal from the probationary period and everything that has ensued subsequent to it.
>
> I certainly would never take a job as a director or officer of a company that I knew very little about and as to which I knew practically nothing of the owners, particularly a public company. It's a grave mistake, because you become in a sense, in the sense of the Securities and Exchange Act — you become responsible as a director and an officer for everything they do.
>
> I recognize that far more fully and clearly than I did then."

The record clearly refutes petitioner's claims that his guilty plea was not entered freely and voluntarily with a full understanding of the nature and consequences thereof. The record clearly establishes that the petitioner understood the nature of the charge, that he

entered his plea freely and voluntarily with a full understanding of the plea and there was a factual basis for the plea.

Under these circumstances it is unnecessary to require an evidentiary hearing to resolve petitioner's claims. *Traber v. United States*, 466 F.2d 483 (5th Cir., 1972); *Hunter v. United States*, 449 F.2d 156 (5th Cir. 1971).

For these reasons, it is

ORDERED AND ADJUDGED that the Motion to Vacate Sentence be and the same is hereby DENIED, and that this cause stands DISMISSED.

DONE AND ORDERED at Miami, Florida, this 2nd day of August, 1975.

/s/ Signature Illegible.
UNITED STATES DISTRICT JUDGE

cc: Bernard Hunter, Est.
1680 N.E. 125th Street,
North Miami, Florida 33181

Lloyd G. Bates, Jr.
Assistant U.S. Attorney
300 Ainsley Building
Miami, Florida

APPENDIX "B"

MATTHEWS v. UNITED STATES

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INDEXED 3927-30

C. CAREY MATTHEWS,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

No. 75-3497.

United States Court of Appeals,
Fifth Circuit.

June 9, 1976.

Motion was filed to vacate and set aside guilty plea on ground that it was coerced by reason of alleged threat from the trial court that defendant would receive at least a ten-year sentence if he did not plead guilty,

which threat allegedly was conveyed by the prosecutor to movant's counsel and through that counsel to movant. The United States District Court for the Southern District of Florida, C. Clyde Atkins, J., denied motion without an evidentiary hearing, and movant appealed. The Court of Appeals, Dyer, Circuit Judge, held that although at time of sentencing movant stated that plea was not induced by any threats or coercion and although his counsel indicated that he had nothing to add to the proceedings, movant was entitled to an evidentiary hearing in view of counsel's sworn affidavit substantiating allegations that threatening statements had been made to him by the prosecutor, sworn affidavit of defendant's law partner stating that he was privy to such conversations and sworn affidavit of prosecutor that he did not make any such statements to counsel.

Reversed and remanded.

1. Criminal Law 997.16(5)

Although at rule 11 colloquy defendant stated that guilty plea was not induced by threats or coercion, defendant was entitled to evidentiary hearing on motion to vacate and set aside plea on ground that it was coerced by reason of alleged threat from trial court that defendant would receive at least a ten-year sentence if he did not plead guilty where petition was supported by counsel's sworn affidavit substantiating allegation that such threatening statements had been made as well as sworn statement of defendant's law partner that the latter was privy to such conversations and sworn affidavit from the prosecutor denying any such statements. Fed. Rules Crim. Proc. rule 11, 18 U.S.C.A.; 28 U.S.C.A. §2255.

2. Criminal Law 997.16(5)

Allegations of a petitioner accompanied by his own affidavit are insufficient to mandate an evidentiary hearing on a petition to vacate and set aside guilty plea as being involuntary in face of a record, as made at time of guilty plea, detailing statements by petitioner that his plea was not induced by any threats or coercion. Fed. Rules Crim. Proc. rule 11, 18 U.S.C.A.; 28 U.S.C.A. §2255.

3. Criminal Law 997.11

It is not improper to refer to magistrate for his recommendation petition seeking to vacate and set aside guilty pleas. 28 U.S.C.A. §2255.

Appeal from the United States District Court for the Southern District of Florida.

Before DYER, SIMPSON and RONEY, Circuit Judges.

DYER, Circuit Judge:

[1] The sole question before this Court is whether the district court erred when it denied Matthews' motion under 28 U.S.C.A. §2255 to vacate and set aside his guilty plea without an evidentiary hearing. We conclude that under the particular facts or this case, an evidentiary hearing was required. We therefore reverse and remand.

Matthews was charged with multiple violations of the Securities Act of 1933, and the Securities and Exchange Act of 1934. After initially pleading not guilty to all counts, Matthews withdrew that plea and, pursuant to *Alford v. North Carolina*, 1970, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162, he entered a plea of guilty to

one count, notwithstanding his continuing assertions that he was innocent of the charges brought against him. The remaining counts were dismissed.

The Section 2255 petition alleged that Matthews was coerced into entering the guilty plea by reason of a threat conveyed by the Assistant United States Attorney heading the prosecution team to Matthews' counsel,[1] and through that counsel to Matthews. The substance of the allegation related to a private conference between the Assistant United States Attorney and the district judge. Since all other codefendants had entered guilty pleas, and since the trial promised to be long, the district judge is alleged to have stated in this conference that Matthews would receive at least a ten year sentence if he did not enter a guilty plea and was subsequently found guilty by a jury. The petition states that this information was relayed to Matthews' counsel by the Assistant United States Attorney, and by Matthews' counsel to Matthews. Important to the outcome of this case, the petition was supported by a sworn affidavit signed by Matthews' counsel, substantiating the allegation that these statements were made to him by the Assistant United States Attorney. A sworn affidavit was also filed by Matthews' law partner, stating that he was privy to the conversation in which Matthews' counsel related these threats to Matthews. Subsequent to the filing of the petition, the government filed a sworn affidavit signed by the Assistant United States Attorney, stating that he had never had such a private conference with the district judge, and that he had never conveyed these statements to Matthews' counsel.

[1]Matthews is represented on the Section 2255 motion by different counsel.

Faced with these conflicting sworn affidavits, the district court [2] nevertheless denied Matthews' Section 2255 petition without an evidentiary hearing on the basis of this Court's en banc decision in *Bryan v. United States*, 5 Cir. 1974, 492 F.2d 775. The district court noted that at the time of sentencing, a full Rule 11 colloquy took place, and Matthews there stated that his plea was not induced by any threats or coercion. His counsel, the same attorney alleged to have received the threat, was also present at the Rule 11 hearing, and, although not addressed directly by the court, indicated that he had nothing to add to the proceedings. In the view of the district court, *Bryan* precluded Matthews from challenging statements made by him in the plea proceeding so as to gain Section 2255 relief. Since he was bound by those statements, no evidentiary hearing was required, and the court could only conclude that his plea was freely and voluntarily entered.

In *Bryan*, this Court en banc drew a balance between the Section 2255 requirement that an evidentiary hearing is necessary unless the motions, files, and records of the case "conclusively show" that the prisoner is entitled to no relief, and the need for finality in the criminal process. As stated in *Bryan*, if a prisoner could challenge prior statements made at a Rule 11 hearing without limit, then the number of hearings which a wilful affiant could provoke as to a single conviction would be limitless, for each time he could swear that someone at the last preceding hearing suborned false testimony from him or his lawyer or that the judge played false in the performance of his duties.

[2]The district judge who received the guilty plea recused himself from consideration of the Section 2255 petition, and the petition was assigned to another judge.

492 F.2d at 780. In reaching this balance, the court *did not* conclude that a Section 2255 petition could never challenge statements made at a prior plea proceeding. As this Court has stated:

> We do not view the foreclosure principle set forth in *Bryan* to constitute an absolute and ironclad rule that the "magic words" of the Bryan-Rule 11 examination completely eliminate the necessity for a hearing on a §2255 motion in all circumstances.

Vandenades v. United States, 5 Cir. 1975, 523 F.2d 1220, 1224. Rather, the Court carefully compared the facts before it to the precepts of the Supreme Court laid down in *Fontaine v. United States,* 1973, 411 U.S. 213, 93 S.Ct. 1461, 36 L.Ed.2d 169, and *Machibroda v. United States,* 1962, 368 U.S. 487, 82 S.Ct. 510, 7 L.Ed.2d 473, both of which required an evidentiary hearing under the "conclusively show" standard of Section 2255. The Court pointed to several characteristics which distinguishes *Bryan* from *Fontaine* and *Machibroda.* First, *Bryan* did not involve allegations of threats or coercion which induced the plea, as in *Fontaine* and *Machibroda.* Second, unlike those two cases, *Bryan* supported his petition with only his own affidavit to counter directly inconsistent former testimony. Thus, *Bryan* is inapposite to the case now before us, where the petition alleges threats which coerced the plea, and where the petition is supported not only by the affidavit of the petitioner, but also by the affidavits of third persons. *See Vandenades, supra,* 523 F.2d at 1224, fn. 6.

[2] Subsequent to *Bryan* we have held that its principles are not limited to situations involving a traditional plea bargain, but that those principles also apply to a Section 2255 petition which alleges that the guilty plea was induced by threats or coercion. In this later situation, under the rationale of *Bryan,* the allega-

tions of the petitioner accompanied by his own affidavit are insufficient to mandate an evidentiary hearing in the face of a Rule 11 record detailing statements by the petitioner that his plea was not induced by any threats or coercion. *United States v. Barrett,* 5 Cir. 1975, 514 F.2d 1241; *Jackson v. United States,* 5 Cir. 1975, 512 F.2d 772.

Subsequent decisions have also held however, that *Bryan* does not apply to eliminate the requirement of an evidentiary hearing when the petition is supported not only by the allegations of the petitioner, but also by credible third party affidavits or other documentary evidence. *Dugan v. United States,* 5 Cir. 1975, 521 F.2d 231; *Vandenades, supra.*

In *Dugan,* the petition alleged an unkept plea bargain and was supported by affidavits of a county deputy and sheriff, stating that both state and federal officials had made promises to Dugan that he would receive a sentence of only four years. At the plea proceeding, the court questioned Dugan as to whether any promises had been made in connection with the guilty plea, and Dugan replied in the negative. This Court concluded that the existence of the supporting affidavits, rather than the negative response elicited at the plea proceeding, was controlling, and an evidentiary hearing was necessary to resolve Dugan's claim. The rationale of *Bryan* was found to be inapplicable when third party affidavits accompanied the petition:

> While allowing a petitioner to obtain an evidentiary hearing by merely alleging an unkept plea bargain would enable a wilful affiant to provoke as to one conviction endless hearings for each time he could swear that someone at the last hearing suborned false testimony, *such rationale for denying a hearing does not control here.* See *Bryan v. United States,* 492 F.2d at 780. When the petitioner

presents affidavits from third parties, the danger of repeated hearings no longer exists.

When petitioner goes beyond mere allegations by presenting credible affidavits that raise a substantial inference that an unkept bargain was in fact made, §2255 requires an evidentiary hearing.

521 F.2d at 233. *See also Vandenades v. United States, supra,* at 1223 ("when the record discloses other credible documentary evidence which indicates a right to relief an evidentiary hearing may be necessary").

The case before us is controlled by *Dugan.* Here, we have affidavits that raise a substantial inference that threats or coercion in fact induced Matthews' guilty plea. Of course, we make no attempt to resolve the conflict in the affidavits before us, nor do we intimate any view as to whether Matthews would be entitled to withdraw his plea if the allegations of his petition are in fact correct. But, as decided in *Dugan,* those affidavits tip the balance drawn by *Bryan.* Matthews is entitled to an evidentiary hearing on his claim.

[3] Matthews also claims that there was an insufficient factual basis for the entry of his *Alford* plea. Further, he challenges the local procedure whereby Section 2255 petitions are referred to the magistrate for his recommendation. We find these assertions of error without merit.

REVERSED AND REMANDED.

Adm. Office, U.S. Courts — West Publishing Company, Saint Paul, Minn.

APPENDIX "C"

MR. SONNETT: Neal Sonnett, representing the Government, along with Bruce Wagner, Assistant United States Attorneys.

MR. BLOCK: Irwin Block, for the defendant, C. Carey Matthews.

MR. SONNETT: Your Honor, Mr. Block, on behalf of the defendant Matthews, and the Government have entered into certain plea negotiations. As a result of those plea negotiations, we are willing to announce to the Court that the following agreements have been reached between the Government and the defendant, Carey Matthews.

The agreement is, first, that the defendant Matthews will enter a plea of guilty to Count 14 of the indictment —

MR. BLOCK: 15.

MR. SONNETT: Count 15 of the indictment.

MR. BLOCK: I am sorry. 14.

MR. SONNETT: 14?

MR. BLOCK: Yes.

MR. SONNETT: Will enter a plea of guilty to Count 14 of the indictment.

The Government has agreed that it will at the time of sentencing dismiss the remaining counts of the indictment against Mr. Matthews.

The Government has agreed that it will join with Mr. Matthews in recommending to the Court that Mr. Matthews be given a probationary period of five years and not incarcerated, and the Government and the defendant have agreed that the Government will recommend that no fine be imposed for Mr. Matthews.

MR. BLOCK: If Your Honor please, we are pleading guilty. I have discussed with the Government and with Mr. Matthews. We are pleading guilty under the provisions of the recent Supreme Court decision of Alford v. North Carolina.

In that regard I have explained that decision to Mr. Matthews so that he would fully understand the nature of it and what the Supreme Court holds.

Mr. Matthews, with the Court's permission, would like to make a very short statement with reference to why he is pleading guilty after I have explained to him the effect of that decision.

THE COURT: Certainly.

MR. MATTHEWS: Your Honor, I am entering a plea of guilty, although I do not believe I have done a criminal act. However, the *circumstances of the case are such, the pressures on me and my family and the*

expenses of it, that I feel that I have no alternative and I must enter a plea of guilty.

As I say, under that case, Alford v. North Carolina, I am entering a plea of guilty, although I think I have done nothing criminal.

THE COURT: Within the purview of that case, do you make this decision, though, freely and voluntarily?

MR. MATTHEWS: Yes, I do, Your Honor. I think that I have been treated with great courtesy by counsel.

MR. SONNETT: Thank you.

THE COURT: You recognize, of course, the fact that you are entering a plea of guilty to the charges contained in this count?

MR. MATTHEWS: Yes, I do, Your Honor.

THE COURT: For the reasons, as I say, that you have stated, but nevertheless it is a legal plea of guilty to those charges.

MR. MATTHEWS: I understand.

THE COURT: Well, in order that the record will be complete, and I suppose out of an abundance of caution, Mr. Matthews, and not to impose on you, let me cover with you the routine questions that I think I probably should ask, even though I know you and know of you.

MR. MATTHEWS: Yes, sir.

THE COURT: And know that you are an attorney.

However, of course, you recognize that for whatever reason you are entering the guilty plea, that you are waiving many of your legal rights.

MR. MATTHEWS: I understand that.

THE COURT: You know, of course, that you are entitled to stand on your not guilty plea.

MR. MATTHEWS: I understand.

THE COURT: That you would be entitled to a jury trial if you requested the same.

MR. MATTHEWS: I understand.

THE COURT: And that all twelve of the jurors would have to agree before you could be found guilty.

MR. MATTHEWS: I understand.

THE COURT: That the law presumes you to be completely innocent unless and until the Government is able to establish your guilt beyond all reasonable doubt.

MR. MATTHEWS: I understand.

THE COURT: That the burden is on the Government to call the witnesses, to introduce the evidence and to establish this guilt.

MR. MATTHEWS: I understand, Your Honor.

THE COURT: That you have no burden at all. You may cross-examine any witnesses called by the Government. You could certainly call witnesses in your own behalf and even testify in your own behalf, but there is no requirement that you do so.

MR. MATTHEWS: I understand, sir.

THE COURT: Other than the agreements that have been announced by the United States Attorney and agreed to obviously by you and by your attorney, are there any other promises or coercion or force or anything that has been placed upon you to induce you to enter this guilty plea?

MR. MATTHEWS: No, sir.

THE COURT: As I say, for whatever reasons, it is a free and voluntary decision on your part?

MR. MATTHEWS: Yes, it is, Your Honor. I explained in my preamble my reasons, and it is free and voluntary on my part.

THE COURT: Is there anything else that either of you feel that I should inquire of Mr. Matthews regarding this tendered plea?

MR. SONNETT: *Other than your statement, Mr. Matthews, have you received any threats or coercion from any government agency in order to induce you to make this plea?*

MR. MATTHEWS: *No, I have not.*

MR. SONNETT: *In all respects, the plea is voluntary on your part?*

MR. MATTHEWS: *Yes, it is.*

MR. SONNETT: Nothing further, Your Honor.

MR. BLOCK: I have nothing further, Your Honor.

THE COURT: Does the Government desire to establish a factual basis?

MR. SONNETT: Yes, sir.

THEREUPON —

DAVID A. ROSS

was called as a witness on behalf of the Government and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SONNETT:

Q State your full name and your occupation.

A David A. Ross; I am a trial attorney with the Securities and Exchange Commission, Washington, D.C.

Q Mr. Ross, in connection with your official duties, have you had occasion to conduct an investigation concerning Mr. Matthews' relationship to the State Fire and Casualty Company?

A Yes.

Q Was that investigation the subject that led to the indictment now being considered against Mr. Matthews?

A Yes.

Q With regard to Count 14, which charges a securities law violation that occurred on or about January 10, 1968, would you please state the results of your investigation.

A During the course of our investigation, after reviewing of documents and interviewing of witnesses, we determined that Mr. Matthews caused the mails to be used to distribute a proxy statement to State Fire stockholders on or about January 10, 1968, which statement did not include certain material information regarding activities of Capital Bancshares and people connected with State Fire. This is in connection with a proposal to postpone a recapitalization plan for State Fire.

Q What was Mr. Matthews' position with State Fire and Casualty Company at the time that proxy went out?

A Mr. Matthews, our investigation showed, was the general counsel to State Fire, a director, a nominee for director, and I think that was it at the time, or possibly a vice president of State Fire.

Q Are the factual allegations, as contained in Count 14, those that have been established by your

personal investigation, interviews with witnesses, examination of corporate records and other records?

A Yes.

MR. SONNETT: We have nothing further at this time, Your Honor.

THE COURT: Any cross-examination of this witness?

MR. BLOCK: No, Your Honor.

THE COURT: Thank you, sir.

(Thereupon the witness was excused.)

THE COURT: Anything else from either

APPENDIX "D"

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 75-3497

RECEIVED SEPTEMBER 13, 1976

U. S. COURT OF APPEALS
FILED
AUGUST 6, 1976

EDWARD W. WADSWORTH, CLERK

Form 703-3

C. CAREY MATTHEWS,
Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Florida

ON PETITIONS FOR REHEARING
(AUGUST 6, 1976)

Before DYER, SIMPSON and RONEY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above entitled and numbered cause be and the same are hereby denied.

APPENDIX "E"

WALL STREET JOURNAL
APRIL 24, 1974

Under the Gun

As Feds Closed In,
Promoter Closed Deal
With Top Nixon Aide

Mort Zimmerman Bought
LaRue Family Business,
Put LaRues on Payroll

Did Prosecutors Go Easy?

By JONATHAN KWITNY
Staff Reporter of
The Wall Street Journal

From 1969 to 1972, S. Mort Zimmerman of Dallas, Texas, may have been the nation's most investigated businessman.

He or some of his corporate enterprises were indicted, enjoined, delisted, suspended or fined by courts, enforcement agencies and a stock exchange. But in January 1972, he struck a bargain with the Justice Department and pleaded guilty to a few of the criminal charges against him.

To the consternation of agents from the Securities and Exchange Commission, the Federal Bureau of Investigation, the Comptroller of the Currency's office, the Postal Service and various state agencies, Mr. Zimmerman never went to prison. Now, a few investigators are beginning to think that somebody pulled strings on Mr. Zimmerman's behalf.

Their evidence—based on matching old SEC files with developments in the Watergate scandal—is only circumstantial. And one SEC man thinks that Mr. Zimmerman may have got off merely because a federal prosecutor was willing to deal with Mr. Zimmerman in return for evidence that would convict another man and better enhance the prosecutor's political ambitions. Mr. Zimmerman himself says he avoided jail fair and square, largely because his violations were only technical.

Still, the evidence solidly links Mr. Zimmerman in a multimillion-dollar deal with Fred C. LaRue and members of his family.

On Mr. Zimmerman's Payroll

Mr. LaRue, as a top aide to Nixon campaign chief John Mitchell, his chief political mentor since 1968, performed duties that included such delicate chores as helping to destroy incriminating evidence and to deliver "hush money" to Watergate burglars, for which he pleaded guilty to conspiracy to obstruct justice. Earlier, as a high-level consultant to President Nixon, Mr. LaRue was unsalaried. But he by no means went uncompensated. While he worked for the President, and while investigators from many agencies were closing in on Mr. Zimmerman, Mr. LaRue, his brother and his brother-in-law were drawing $100,000 a year from a company controlled by Mr. Zimmerman. The LaRue group had a large stock interest in the company. And Mr. Zimmerman, through stock purchases and a big bank loan, funneled them additional chunks of cash.

The LaRue group got into this position through the sale of its debt-ridden family concern. Larco Drilling Corp. to Mr. Zimmerman's Capital General Corp. (then Capital Bancshares Inc.) in April 1968. The investigations of Mr. Zimmerman had been intensifying for nearly a year by that time. Larco, a Gulf Coast oil and gas firm, had been founded by Fred LaRue's father, I. P. LaRue, Sr., who was accidentally shot to death by Fred LaRue in a hunting mishap. By 1969 Larco was owned by Fred LaRue; his brother, I. P. (Ike) LaRue Jr., and Fred LaRue's brother-in-law, Harry Owen.

At the time they sold it to Capital General, Larco's assets were valued at $3,700,493 (including a $390,000 loan to Messrs. LaRue and Owen), its liabilities at $3,753,335. Mr. LaRue says the deficit may have resulted from valuing the assets (mainly drilling equipment and some oil property) at cost rather than market value, though he says that he isn't sure now. In any case, Mr. Zimmerman's Capital General gave the LaRue family 22,085 shares of Capital General, worth nearly $2 million based on their $9-a-share bid price in the over-the-counter market, in return for Larco.

A $750,000 Loan: Easy Terms

But in a complex fashion characteristic of many of his business deals, Mr. Zimmerman sweetened the pot considerably for the LaRue family. He arranged with his banker, Roger B. Mize, to let Mr. LaRue and his relatives borrow $750,000 from a Texas bank of which Mr. Mize was chairman. A Capital General subsidiary bought $350,000 in certificates of deposit from two other banks with which Mr. Mize was associated to induce the loan. Collateral of 82,500 shares of Capital General was put up, presumably by the LaRue family, though records and memories now are unclear on the subject. Still, Capital General was committed to repay the loan if the LaRue family didn't.

Of the $750,000 the LaRue family members were permitted to borrow they used $390,000 to repay the money Messrs. LaRue and Owen had borrowed from

Larco. They lent Larco another $200,000. They kept the remaining $160,000, Mr. LaRue says.

Finally, Capital General agreed to employ Mr. LaRue and his relatives for a total of $100,000 a year, to be divided as they chose, and to issue them stock options, which never were exercised because the price on Capital General stock fell. Mr. LaRue became president of Capital General's new Larco subsidiary.

Troubles, but a Pay Raise

The deal looked good at first. Then it soured. By March 1970, the price on Capital General stock had fallen to $3 or $3.50 a share. The LaRues' Capital General shares, once worth about $2 million, then were worth no more than $677,000, although their bank loan had been reduced $200,000 by installments paid by Capital General under the original agreement.

Despite his own troubles, Mr. Zimmerman stepped in and had Capital General offer to buy back for $750,000, or $12.50 a share, the 62,500 Capital General shares still held by the bank as collateral for the LaRues' loan. This offer, had it been carried out, would have more than repaid the LaRues' remaining debt. While the LaRues considered this offer, Capital General also offered to upgrade the dwindling value of the LaRues' loan collateral by adding stock in Capital General subsidiaries. And Capital General offered to raise to $160,000 a year from $100,000 the compensation to the LaRues.

Throughout this 1969-70 period, Mr. Zimmerman was in trouble. The same month he made the Larco deal, State Fire & Casualty Co., a Miami-based insurer that had been a subsidiary of Capital General until 10 months earlier, went bankrupt. It folded after a complicated deal involving Mr. Zimmerman and Edward Wuensche, who had been convicted of fencing stolen stock and who had detailed his Mafia ties in congressional testimony. The deal resulted in State Fire's valuable assets being replaced by worthless securities. During the 18 months Mr. Zimmerman controlled State Fire, he transferred $1.5 million of its liquid assets to Capital General in exchange for stock in a Capital General subsidiary. He took back this stock when he sold State Fire and arranged for Wuensche to replace it with securities that turned out to be worthless. Besides setting the stage for State Fire's bankruptcy, this brought the investigators down on Mr. Zimmerman.

He faced other setbacks. The Comptroller's office was pressuring him to yield control of a chain of banks that Capital General owned. Their questionable loans allegedly had created big losses. Mr. Zimmerman had contracted to sell his flagship bank, Capital National of Miami. But the Comptroller's office was unhappy because the chosen buyer was a Netherlands Antilles-based mutual fund run by Allen Lefferdink, a controversial offshore-fund promoter whose Colorado financial empire had been brought down already by the SEC.

In April 1969, the same month he made the Larco deal, Mr. Zimmerman's Capital General sold control of its Underwriters Trust Co., New York. Later, in testimony at a congressional hearing, it was disclosed that under Mr. Zimmerman's control, Underwriters Trust had accepted as loan collateral more than $1 million in stolen securities.

And also about the time of the Larco deal, the insurance departments of Florida and Arkansas, along with the U.S. Postal Service, were contemplating action against Mr. Zimmerman over the bankruptcy of North American Guaranty Insurance Co., Little Rock. Some 16,000 policyholders had been stripped of their protection when North American's assets evaporated during a stock swap involving Capital General.

The American Stock Exchange and the SEC were keeping a close eye on Mr. Zimmerman's Intercontinental Industries conglomerate because of the involvement of a prominent Mafia figure, Michael "Big Mike" Polizzi. Later, in the summer of 1969, the Amex and the SEC accused Intercontinental of issuing false publicity releases. Mr. Zimmerman consented to a civil-court injunction against fraud. Trading in the stock was suspended in June 1969. The Justice Department, which handles criminal prosecutions for federal investigative agencies, was beginning a probe into Mr. Zimmerman's affairs.

White House Pass

Throughout this period—the spring and summer of 1969—and, in fact, up until early egory of special projects." A wealthy Mississippian and longtime Republican leader, Mr. LaRue had contributed early to Mr. Nixon's 1968 campaign and became a top aide to John Mitchell, who ran the campaign. After the 1968 election, Mr. LaRue went to work directly for the President, and Mr. Mitchell, of course, became Attorney General.

Though Mr. LaRue wasn't a full-time employe of the President's, he had a White House pass, and he was supposed to be available at all times for assignment. According to a White House spokesman, the only comparable post under Mr. Nixon was that held by former Treasury Secretary John Connally when he returned to Washington last year to assist the President. But Mr. Connally, unlike Mr. LaRue, was barred from outside work while he served as special consultant.

(Early in 1972, Mr. LaRue left the White House to work under Mr. Mitchell again in the Nixon campaign. This work led him into the Watergate cover-up. He pleaded guilty on June 27, 1973, to conspiracy to

obstruct justice. Sentencing has been delayed until he completes his testimony against other defendants.)

Mr. Zimmerman's connection with a top Nixon strategist, whatever other value it may have had, did little to stop the downhill side of his business ventures. And Capital General's stock plummeted. On Sept. 15, 1970, a year and a half after the Larco deal, it hit $1.75 bid. On that date the LaRues ended their employment agreement with $180,000 having been paid. But Larco, still a Capital General subsidiary, bought back from them 18,634 shares of Capital General stock at $6 a share, for a total of $111,804, to cover debts the LaRues had incurred, and Larco agreed to buy back from the family another 105,000 shares at $6 in installments. Also, the LaRue group was released from all liability for the $750,000 bank loan. Capital General stock continued to fall in the open market, hitting $1 bid on Nov. 19.

"Washington Pulled the String"

Mr. Zimmerman's legal troubles were coming to a head, too. On April 30, 1971, he and four associates were indicted by a federal grand jury in Miami on 19 counts of mail and securities fraud involving Capital General's looting of State Fire. In December 1971 the grand jury added a charge that Mr. Zimmerman attempted to bribe an assistant U.S. attorney with $40,000 to win dismissal of the first indictment.

A month later, investigators were shocked to learn that Mr. Zimmerman had negotiated a high-level Justice Department deal. He was allowed to plead guilty to four counts, for which he was fined $30,000, put on probation and given immunity from all other charges. The deal took place in January 1972, when Messrs. Mitchell and LaRue were preparing to move from the Justice Department and the White House, respectively, to the Committee to Re-Elect the Presi-

dent. The arrangement was made by Assistant U.S. Attorney Neil Sonnett in Miami, but it was overseen by Robert Hickey, supervisor of the criminal fraud section of the Justice Department in Washington.

Mr. Hickey flew to Miami for the negotiations. He and Mr. Sonnett agreed to let Mr. Zimmerman plead guilty to the handful of charges in return for a light sentence and dismissal of the other charges.

"Somebody in Washington pulled the string on us," says Kathryn Gregory, a lawyer who recently retired as an official of the Florida Insurance Department. "I think it had to be through LaRue. We spent years working on that case." Irving Bober, another attorney for the department, also cites the LaRue connection as a factor in Mr. Zimmerman's probation. "It was a Washington deal," he says. "My best judgment is that everybody knew what was going on down here (in Florida)," he says.

Was Society Cheated?

In Washington, the Justice Department declines to comment, but some individuals involved dispute any suggestion that Mr. LaRue influenced the settlement. Mr. Sonnett, now a Miami attorney, says he had to persuade the Justice Department to agree to it. He says he considered it simply on its merits.

David Ross, an SEC attorney, protested the settlement. But he says he thinks the LaRue connection had nothing to do with it. He says it came about because Mr. Zimmerman had promised to testify against a co-defendant, Carey Matthews, a prominent Florida legislator, against whom evidence was weak. He says that Mr. Sonnett, the assistant U.S. attorney in Miami, was more interested in convicting a local politician—Mr. Matthews—because Mr. Sonnett was about to quit his job to run for state office and the Matthews' conviction would be a feather in his cap. Mr. Sonnett

did quit to seek the Democratic nomination for state attorney in Dade County—and lost; he says the handling of the Zimmerman case had nothing to do with his political aims. And Mr. Ross says higher officials in the Justice Department, rather than wanting to let Mr. Zimmerman get off, had preferred a two-year jail sentence.

But the federal judge in the case, Peter Fay, was uneasy about the settlement. "I was very upset about the plea bargaining procedure because it made the court into a rubber stamp," he says. If the defendants were guilty of all the charges, he said at the time, "our judicial system and society have been cheated." Judge Fay says he went along with the agreement made by the prosecutors because Mr. Zimmerman and his codefendants had exposed themselves by offering evidence and otherwise living up to their end of the deal. He says he didn't learn about the LaRue connection until long afterward.

Mr. Zimmerman is coy about the LaRue connection. "He knew I had problems with the government," he says of Mr. LaRue. "He knew they were fishing around my office for everything they could find. I always told him I am a man who likes to meet with people, anybody in government. I never had the opportunity. I think he might have discussed it with people he knows, but I never talked (to them)."

The LaRues Get Out

Mr. LaRue doesn't exactly remember it that way. "I don't recall him ever bringing the subject up," Mr. LaRue says, "and I wouldn't have (interceded) anyway."

(However, a former FBI agent, William F. Higgins Jr., says he suspects that the Larco deal may have influenced orders he got to stop investigating a Cleve-

land businessman with close ties to Mr. Zimmerman. The agent was fired from the FBI after he kept probing for fraud in several large bankruptcies involving the businessman. The Justice Department says Mr. Higgins SEC civil fraud injunctions in the case, and he is suing for reinstatement.)

Mr. Zimmerman pleaded guilty in January 1972. In the same month, Capital General sold all the non-cash assets of Larco to Transcontinental Oil Corp., a New Orleans-based firm, for 225,000 shares of Transcontinental stock, then worth about $540,000, and $2.5 million in notes. The shares since have risen to about $1.2 million, but most of the stock and notes went into an escrow account to pay off Larco creditors, says R.A. Oxenreiter, vice president of Transcontinental Oil. "When we bought (Larco), it was for all practical purposes bankrupt," he says.

A few months later, on April 12, 1972, Capital General turned over to Mr. LaRue and his relatives 25,000 shares of Transcontinental Oil. The family, in turn, agreed to return 6,000 shares of their remaining holding in Capital General, releasing them from all remaining debts and obligations under the original deal. By that time, the $750,000 loan to the family by Mr. Mize's bank had been paid down to $433,215.64 by Capital General. Mr. Zimmerman says he doesn't know exactly how the loan stands now.

APPENDIX "F"

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 71-606-CR-PF

UNITED STATES OF AMERICA,
Plaintiff,

—vs—

C. CAREY MATTHEWS,
Defendant.

AFFIDAVIT

STATE OF FLORIDA)
)SS
COUNTY OF DADE)

BEFORE ME, the undersigned authority, personally appeared PHILIP J. MANDINA, who, after being first duly cautioned and sworn, deposes and says:

I am an attorney, a member of the Florida Bar, with offices located at 1710 South Bayshore Drive, Miami, Florida.

That during the approximate period 1965 through January 1972, I was a member of a law partnership with C. Carey Matthews.

On or about October 13, 1971, Mr. Matthews was indicted, along with three other parties, in a case filed in the District Court of the United States for the Southern District of Florida, Case No. 71-606, CR-PF, charging him and the other parties with certain violations of the Securities and Exchange Acts of 1933 and 1934.

The aforesaid charges arose out of Mr. Matthews accepting a commitment in January 1968 to serve as general counsel of the State Fire and Casualty Company, Miami, Florida. Said company was in financial straits which eventually resulted in its liquidation by the Florida Insurance Department.

During this period of time, our firm also served as defense counsel, defending various liquidated suits involving the assureds of State Fire.

At the request of the President of the company, we also moved our law offices and subleased space in a building leased to State Fire and Casualty Company, however, our firm maintained separate offices in that building.

As defense counsel to represent him in the aforesaid trial, Mr. Matthews retained Irwin Block, Esquire, distinguished member of the Florida Bar with offices in Miami, and subsequent president of the Dade County Bar Association.

The indictment in question basically accused the Defendants of conspiring to violate the Securities and Exchange Acts aforementioned, and the Rules and Regulations of the Securities Exchange Commission in

various ways designed to defraud the company and its assets.

Mr. Matthews served as general counsel and as an officer and director for a period of seven months, resigning on July 23, 1968. The company continued its business until April of 1969 when it was placed in liquidation. During the approximate seven months of Mr. Matthews connection with State Fire, he was absent for the best part of January and June in two separate special sessions of the Florida Legislature of which he was a member. He did not have an office with State Fire but his office was located with our law firm, and I know of my own knowledge that he conspired with no one to defraud State Fire, or to violate the laws and regulations pertaining to the Securities and Exchange Commission.

The trial in the Southern District of Florida was scheduled to come before Judge Peter Fay on or about January 10, 1972. Several days before the trial date, Mr. Matthews and I were in our law office discussing the forthcoming trial and going over the exhibits in readiness for said trial. All of the other defendants had plead guilty to certain counts of the indictment after plea bargaining and had received favorable treatment from the United States Attorney in connection with the pleas. It was clear to us that certain defendants, in particular Benjamin Dobson, the President of State Fire, were not willing to discuss the case and their testimony with our counsel, Mr. Block, or with us, although up until a few days before trial, Dobson had stated that he was prepared to testify to the truth that Mr. Matthews was not involved in any way with any conspiracy in connection with State Fire.

Suddenly, Dobson refused to return our phone calls and Mr. Block, Mr. Matthews' attorney, called this to the attention of the court by motion for continuance. This motion was denied.

On the day in question, which I believe was January 7, 1972, as Mr. Matthews and I were discussing the case in our law office, we received a call from Irwin Block, Mr. Matthews' counsel. Mr. Block requested that both of us get on the phone on different extensions as he had important information to convey.

Mr. Block stated to Mr. Matthews and to me that he had just come from a discussion with Mr. Neal Sonnett, the Chief of the Crimes Division, United States Attorney's Office in Miami, concerning Mr. Matthews' entering a plea of guilty to at least one count of the 19 count indictment. Several such discussions had been held at prior times during the week by Mr. Block and Mr. Sonnett, but Mr. Matthews had told me and we agreed that he was going to go to trial on the case no matter what the other defendants did or what pressures were brought upon them to bring false testimony against him.

Mr. Matthews with me on the telephone on these prior occasions when Mr. Block had reported the discussions with Mr. Sonnett to us, had indicated to Mr. Block that he was ready to go to trial and wanted a trial despite whatever pressures the government could bring on the witnesses.

In this final telephone conversation, which I believe was on January 7th, Mr. Block was considerably upset and related to us that Mr. Sonnett had just

advised him that he had just left the office of Judge Peter Fay, the trial judge, who had discussed with him the forthcoming trial date and the fact that Mr. Matthews was to be the only defendant. Sonnett related that the Judge was upset about the possibilities of a trial lasting several months and that the Judge had conveyed to him that the message should be made known to Mr. Matthews and his counsel that in the event of conviction of one of the counts of the 19 count information, he would impose upon Mr. Matthews a ten-year sentence to the Federal Penitentiary. Block, myself and Mr. Matthews were stunned at this statement.

Matthews said to me, "This is hard to believe, but I can't believe that the Chief of the Crimes Division would risk deliberately lying about a threat like this from the judge. I have to believe it's true."

After further discussion, Mr. Matthews said to me, "This is a terrible threat to put on a man with three children, a one-year old, three-year old and four-year old. What would ever become of them? I can't afford to take a chance on a conviction and a ten-year sentence, especially with a threat like this. For my family's sake, I really have no alternative."

Mr. Matthews then agreed to meet with Irwin Block to enter a plea of guilty to a single count of the indictment pending against him, Count 14.

As to Count 14 of the indictment; it pertained to a violation of certain regulations of the Securities and Exchange Commission and Act in causing to be mailed certain proxy statements containing misleading infor-

mation or omitting to state information which should have been placed in the proxy statements.

Actually, I know as a matter of fact that the proxy statement in question was not prepared by Mr. Matthews, it was prepared by Norman Leibling, a Chicago, Illinois attorney and outgoing general counsel of State Fire. Neither Mr. Matthews nor our office participated in any way in the distribution or disseminating of the proxy statement, which was done by State Fire and Casualty Company itself.

I know of my own personal knowledge from the discussions with Mr. Block on January 7th, as hereinabove related, and thereafter with Mr. Matthews, that Mr. Matthews would never have entered a plea of guilty of any count of the indictment, as he was innocent of all counts thereof, and only did so on the alleged direct threat relayed by Assistant United States Attorney Neal Sonnett to Irwin Block, Mr. Matthews' attorney, and thus to Mr. Matthews, that a ten-year sentence awaited him if convicted. For family reasons as above stated, he sacrificed his political and legal future. An injustice has been done here and should be righted.

FURTHER AFFIANT SAYETH NOT.

/s/ Philip J. Mandina
Philip J. Mandina

SWORN to and SUBSCRIBED before me
this 10 day of June, 1975.

/s/ Donna B. Wallace
NOTARY PUBLIC, State of Florida at Large
My Commission expires: Feb. 10, 1976

APPENDIX "G"

STATE OF FLORIDA
COUNTY OF DADE

Before me, the undersigned authority, personally appeared IRWIN J. BLOCK, who, being by me first duly sworn, did depose and say:

1. In 1971 and in January of 1972, he was representing Carey Matthews in connection with a case pending in the United States District Court before the Honorable Peter T. Fay, United States District Judge, involving Carey Matthews and other defendants.

2. On the eve of trial, the undersigned was contacted by Neal Sonnett, Assistant United States Attorney, and to the best of undersigned's knowledge, advised that the Court had indicated to him, Mr. Sonnett, that if Carey Matthews went to trial and was found guilty, he would be sentenced to a substantial term of years, the exact number of which Affiant does not remember today, but which he believes to be in excess of ten years.

3. Your Affiant immediately conveyed this information to Carey Matthews who, thereafter decided to plead guilty, rather than take the chance of being

sentenced to the time indicated by the Assistant United States Attorney.

Further, Affiant saith not.

/s/ Irwin J. Block
IRWIN J. BLOCK

Sworn to and subscribed before me
this 11th day of June, 1975.

(Signature Illegible)
Notary Public State of Florida at Large
My commission expires Mar. 9, 1977

No. 76-629

Supreme Court, U. S.
FILED
JAN 31 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

C. CAREY MATTHEWS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DANIEL M. FRIEDMAN,
Acting Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

MERVYN HAMBURG,
JOHN H. BURNES, JR.,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-629

C. CAREY MATTHEWS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A-8 to A-11) is reported at 533 F. 2d 900. The opinion of the district court (Pet. App. A-1 to A-7) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 9, 1976, and a petition for rehearing was denied on August 6, 1976 (Pet. App. A-20). The petition for a writ of certiorari was filed on November 4, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the inquiry conducted by the district court prior to accepting petitioner's guilty plea established an adequate factual basis for the plea.

STATEMENT

1. An indictment filed on October 31, 1971, in the United States District Court for the Southern District of Florida charged petitioner and four other persons with multiple violations of the Securities Act of 1933 and the Securities and Exchange Act of 1934 in connection with a scheme to defraud policyholders, claimants, agents, creditors, and public minority stockholders of State Fire and Casualty Company, a Florida corporation engaged in the insurance business. On January 7, 1972, pursuant to a plea bargain whereby the remaining counts of the indictment would be dismissed and the government would recommend a sentence of five years' probation, petitioner sought to withdraw his plea of not guilty and to enter a plea of guilty to one count of the indictment (Pet. App. A-1).

Before accepting a guilty plea to Count 14, which charged petitioner with causing the distribution of a false and misleading proxy statement, in violation of 15 U.S.C. 78j(b) and 78ff(a) and 18 U.S.C. 2, the district court conducted an inquiry as required by Rule 11, Fed. R. Crim. P. At the outset, defense counsel stated that although petitioner did not believe that he had committed a crime, he wished to enter a plea of guilty in accordance with this Court's decision in *North Carolina* v. *Alford*, 400 U.S. 25. The court advised petitioner that by pleading guilty he would waive certain constitutional rights, including trial by jury, the presumption of innocence, the requirement that the government prove his guilt beyond a reasonable doubt, the right to summon and cross-examine witnesses and the privilege against self-incrimination. Petitioner, an attorney, replied that he understood these consequences and that his decision to plead guilty was a free and voluntary one that was based solely on the circumstances of the case, his concern for his family, and the probable expenses of trial (Pet. App. A-13 to A-17).

The government then called David Ross, an attorney with the Securities and Exchange Commission who had conducted an investigation of petitioner's relationship with State Fire, to establish a factual basis for the plea. Ross testified that the investigation revealed that on or about January 10, 1968, petitioner, who was the vice president, general counsel and a director of State Fire at the time, had caused the mails to be used to distribute a proxy statement that failed to include certain material information regarding postponement of a recapitalization plan for the company. Ross also stated that the other factual allegations in Count 14 were established by his personal investigation (Pet. App. A-17 to A-19). Petitioner did not challenge any portion of this testimony and specifically declined to cross-examine Ross (*id.* at A-19). Following this evidentiary presentation, the court concluded (App., *infra*, p. i):[1]

> THE COURT: Well, the Court, being satisfied that there is a factual basis for the charges contained in Count 14 of the indictment, and being further of the opinion that the defendant does understand the nature and the consequences of these proceedings, and recognizing the agreement that has been announced by counsel and the statement made by the defendant, hereby accepts the defendant's plea of guilty to the charges contained in Count 14 and now adjudges the defendant, C. Carey Matthews, guilty of the charges contained in Count 14 of the indictment.

On January 26, 1972, petitioner was sentenced in accordance with the plea agreement.

2. More than three years after his conviction, on June 10, 1975, petitioner filed a motion to vacate his sentence

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[1] Appendix C to the petition fails to include the last two pages of the transcript of petitioner's Rule 11 proceeding. Accordingly, we are appending the remaining pages to this brief.

pursuant to 28 U.S.C. 2255, contending that his guilty plea had been coerced and that there had been an insufficient factual basis for the plea. The district court denied the motion without an evidentiary hearing, finding that the transcript of the guilty plea proceeding established that the plea had been freely and voluntarily made and that it was supported by a sufficient factual basis (Pet. App. A-1 to A-7).

The court of appeals reversed and remanded. Although it agreed with the district court that there was no merit to petitioner's contention regarding the factual basis for his plea, the court of appeals concluded (Pet. App. A-9 to A-11) that petitioner was entitled to an evidentiary hearing on the claim that his plea had been coerced by a threat, allegedly conveyed by the Assistant United States Attorney, that the trial judge would sentence petitioner to at least ten years' imprisonment if he refused to plead guilty and was subsequently found guilty by a jury.[2]

ARGUMENT

1. The petition should be denied as premature. Since the court of appeals has remanded the case to the district court for an evidentiary hearing on the voluntariness of petitioner's guilty plea, review of petitioner's contentions regarding the factual basis for that plea would be inappropriate at this stage. If the district court determines that the plea was coerced, the conviction would be vacated and petitioner would be allowed to plead anew. *Machibroda* v. *United States*, 368 U.S. 487, 493. If, on the other hand, the district court determines that the plea was freely and voluntarily entered, petitioner thereafter will have an adequate

[2]Although petitioner had expressly denied the existence of any threats at his guilty plea proceeding, the court held that he was nevertheless entitled to an evidentiary hearing in light of the affidavits filed by petitioner's counsel and his law partner that corroborated the allegations in his Section 2255 motion.

opportunity to appeal that finding to the court of appeals and, if necessary, to seek review in this Court both of the voluntariness of and the factual basis for the plea. See *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363, 365, n. 1; *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399, 418; *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 257-258.

2. In any event, the court of appeals properly rejected petitioner's claim that the district court violated Rule 11, Fed. R. Crim. P., by failing to develop a sufficient factual basis for the plea. Even assuming that a failure to comply with this requirement of a rule of criminal procedure would entitle petitioner to relief under Section 2255,[3] it is clear that Rule 11 was satisfied. All that Rule 11 requires is that the district court's inquiry be "factually precise enough and sufficiently specific to develop that [the defendant's] conduct on the occasions involved was within the ambit of that defined as criminal." *Jimenez* v. *United States*, 487 F. 2d 212, 213 (C.A. 5), certiorari denied, 416 U.S. 916. See *United States* v. *Davis*, 516 F. 2d 574, 577-578 (C.A. 7). Here, the government presented the testimony of the S.E.C. attorney who had conducted the investigation that led to petitioner's indictment. The attorney's unchallenged summary of the results of that investigation sufficiently established the factual allegations contained in Count 14 of the indictment and constituted adequate compliance with Rule 11. See *United States* v. *Bethany*, 489 F. 2d 91 (C.A. 5). Contrary to petitioner's contention (Pet. 14-15, 27-28, 34), the court was not required to make an in-depth examination of the facts underlying each element of the offense.[4]

[3]We believe that it would not. See *Davis* v. *United States*, 417 U.S. 333, 346; *McRae* v. *United States*, 540 F. 2d 943 (C.A. 8), certiorari denied, No. 76-5435, January 10, 1977; *Bachner* v. *United States*, 517 F. 2d 589 (C.A. 7).

[4]Although petitioner claims that there was no evidence of his criminal intent, this element of the crime frequently cannot be shown by direct evidence and may be inferred from the other evidence adduced.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

MERVYN HAMBURG,
JOHN H. BURNES, JR.,
Attorneys.

JANUARY 1977.

APPENDIX

THE COURT: Anything else from either party?

MR. SONNETT: Just to clear up the record, I previously announced that at the time of sentencing the Government would dismiss the remaining counts of the indictment.

THE COURT: Yes. That was part of the agreement, as I understand it, and as I wrote it down.

MR. BLOCK: We have nothing further, Your Honor.

THE COURT: Well, the Court, being satisfied that there is a factual basis for the charges contained in Count 14 of the indictment, and being further of the opinion that the defendant does understand the nature and the consequences of these proceedings, and recognizing the agreement that has been announced by counsel and the statement made by the defendant, hereby accepts the defendant's plea of guilty to the charges contained in Count 14 and now adjudges the defendant, C. Carey Matthews, guilty of the charges contained in Count 14 of the indictment.

I would like to refer this matter to the Probation Department for a presentence investigation, but I would certainly state on the record, as I have told counsel before, that if there is nothing shocking or unusual, I will undoubtedly go along with the agreement.

The only inquiry I did not make of Mr. Matthews that does occur to me now, and I might make it by way of inquiry and with explanation—obviously, the agreement that has been made by and between counsel is not binding on the Court, Mr. Matthews.

Are you aware of that?

MR. MATTHEWS: I am, Judge.

THE COURT: However, if the Court for any reason does not see fit to go along with this agreement, I will advise you

of that fact and afford you the opportunity of withdrawing your guilty plea and returning to your not guilty plea.

MR. MATTHEWS: Thank you, Your Honor.

THE COURT: But in the absence, as I say, of anything unusual or something that we are not aware of, the Court will follow the agreement of counsel in accordance with the suggested ABA procedures and the Supreme Court opinions in that regard.

Mr. Matthews, I would urge you to cooperate with the probation officer. Give him as much information as possible. I will ask him for what we could call an abbreviated presentence investigation, but obviously the more material he has, the better and more complete report he can submit to the Court along with his recommendation.

Secondly, at the time the matter is set for sentencing, if you have any additional information or material or statement that you would like to make to the Court, you will certainly be afforded that opportunity and you can make it personally or through your attorney or call any witnesses that you should want to in that regard.

MR. MATTHEWS: Thank you, sir.

FILED
FEB 14 1977
MICHAEL RODAK, JR., CLERK

in the

Supreme Court of the United States

CASE NO. 76-629

C. CAREY MATTHEWS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

RESPONSE TO SUGGESTION THAT PETITIONER'S PETITION FOR CERTIORARI IS PREMATURE

LAW OFFICES OF
LEO GREENFIELD, P.A.
1680 N.E. 135th Street
North Miami, Florida 33181
Attorneys for Petitioner

FLORIDA FINANCIAL PRINTING, INC. — 377-2810

in the

Supreme Court of the United States

CASE NO. 76-629

C. CAREY MATTHEWS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

RESPONSE TO SUGGESTION THAT PETITIONER'S PETITION FOR CERTIORARI IS PREMATURE

COMES NOW the Petitioner, C. CAREY MATTHEWS, by and through his undersigned attorneys, and files this, his Response to the suggestion that Petitioner's Petition for Certiorari is premature, raised in the six page Brief of the Government untimely filed in opposition to Petitioner's Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, and in support thereof avers:

1. The basic argument presented in the Government's Brief is that the Petitioner's request should be denied as premature. The Government states therein that since the Fifth Circuit has, "remanded the case to the district court for an evidentiary hearing on the voluntariness of petitioner's guilty plea, review of petitioner's contentions regarding the factual basis for that plea would be inappropriate at this stage."

2. In the interest of justice, the Petitioner advises the Court that the Evidentiary Hearing in question, has taken place and the United States District Court for the Southern District of Florida, has entered its Order denying the Petitioner's Amended Motion to Vacate his Guilty Plea, on the grounds that said plea was involuntary. Said Order rejecting the Petitioner's Amended Motion after Evidentiary Hearing dated October 13, 1976, is appended hereto as Exhibit "A", and the Order denying Petition for Rehearing, dated November 13, 1976, is appended hereto as Exhibit "B".

3. Accordingly, then, the Petition for Writ of Certiorari herein involved, is not premature, and in fact, unless the Petitioner had brought this Petition from the decision of the Fifth Circuit herein involved, the time to do so would have expired, and with it, the jurisdictional

basis for the contention of the Petitioner that his constitutional rights have been grievously violated in the instant cause.

WHEREFORE, the Petitioner respectfully requests his Petition for Writ of Certiorari to the Fifth Circuit be granted forthwith, by this Honorable Court.

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true copy of the foregoing was this 8th day of February, 1977, mailed to:

ROBERT W. RUST, ESQ.,
U.S. Attorney
Ainsley Bldg.,
Miami, Florida

and

ROBERT H. BORK, ESQ.,
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

LAW OFFICES OF
LEO GREENFIELD, P.A.
1680 N.E. 135th Street
North Miami, Florida 33181
Attorneys for Petitioner

By_____
Leo Greenfield

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 74-1134-Civ-CA

C. CAREY MATTHEWS,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

ORDER DENYING MOTION TO VACATE SENTENCE

[Filed Oct. 13, 1976]

THIS CAUSE came before the Court on plaintiff's motion to vacate sentence. The motion is denied.

On September 2, 1976, this Court conducted an evidentiary hearing directed to the issue of whether the government induced plaintiff's guilty plea by means of threat vel non. Because plaintiff alleged that the threat was made by the government attorney to plaintiff's attorney over the telephone, the testimony of those persons is the relevant testimony before the Court. The subjective thoughts of plaintiff and his partner are not material to the issue.

After careful analysis of the testimony adduced at the hearing, and after consideration of the memoranda submitted by both parties, it is the finding of this Court that although the attorney for the government may

have speculated to plaintiff's attorney that his client would receive a lengthy sentence if convicted, there was no threat conveyed. Accordingly, it is

ORDERED AND ADJUDGED that the motion to vacate sentence is denied.

ENTERED at Miami, Florida this 13th day of October, 1976.

/s/ C. Clyde Atkins
United States District Judge

cc.
U.S. Attorney
Leo Greenfield, Esq.

EXHIBIT "A"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 74-1134-Civ-CA

C. CAREY MATTHEWS,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

ORDER

[Filed Nov. 3, 1976]

THIS CAUSE having come before the Court on Petition for rehearing and the Court having considered the record in this cause, and being otherwise duly advised, it is

ORDERED AND ADJUDGED that said motion is DENIED.

DONE AND ORDERED at Miami, Florida, this 1st day of November, 1976.

/s/ C. Clyde Atkins
UNITED STATES DISTRICT JUDGE

copies furnished:
Leo Greenfield, Esq.
AUSA

EXHIBIT "B"

Supreme Court, U. S.
FILED
FEB 14 1977
MICHAEL RODAK, JR., CLERK

in the

Supreme Court of the United States

CASE NO. 76-629

C. CAREY MATTHEWS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

MOTION TO STRIKE BRIEF FOR THE UNITED STATES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LAW OFFICES OF
LEO GREENFIELD, P.A.
1680 N.E. 135th Street
North Miami, Florida 33181
Attorneys for Petitioner

FLORIDA FINANCIAL PRINTING, INC. — 377-2610

in the

Supreme Court of the United States

CASE NO. 76-629

C. CAREY MATTHEWS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

MOTION TO STRIKE BRIEF FOR THE UNITED STATES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COMES NOW the Petitioner, C. CAREY MATTHEWS, by and through his undersigned attorneys and moves to strike, as untimely, the Brief of the United States in Opposition to Petition for Writ of Certiorari, and in support thereof, avers:

1. On November 3, 1976, Petitioner filed with this Honorable Court his Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

2. On the 23rd day of December, 1976, counsel for the United States filed its request for extension of time to file the response Brief to the Petition for Writ of Certiorari, and said request was granted by the Court, extending the time for filing said Brief until January 11, 1977.

3. The Brief for the United States of America was not filed on or before January 11, 1977, in accordance with the Rules of this Honorable Court and its Order, but, on the contrary, it was placed in the mail on January 31, 1977, and actually received by counsel for the Petitioner on February 3, 1977.

4. Accordingly, without permission or Order of this Court, counsel for the Government has seen fit to ignore the Court's Order and the Supreme Court's Rules and has served its Brief in Opposition to Petition for Writ of Certiorari by placing the same in the U.S. Mail, twenty days after its time for doing so had expired by Order of this Court.

5. Accordingly, in the interest of justice, the Court should order stricken the Brief of the United States of

America in Opposition to Petition for Writ of Certiorari, as indeed, would be stricken the Brief of any Petitioner or Respondent other than the Government who saw fit to file Briefs in a fashion so untimely.

WHEREFORE, Petitioner, C. CAREY MATTHEWS, respectfully requests that this Honorable Court strike the Brief of the United States of America in Opposition to Petition for Writ of Certiorari, and that the Writ of Certiorari be granted, forthwith.

Respectfully submitted,

LAW OFFICES OF
LEO GREENFIELD, P.A.
1680 N.E. 135th Street
North Miami, Florida 33181
Attorneys for Petitioner

By_____
Leo Greenfield

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true copy of the foregoing was this 8th day of February, 1977, mailed to:

ROBERT W. RUST, ESQ.,
U.S. Attorney
Ainsley Bldg.
Miami, Florida

and

ROBERT H. BORK, ESQ.,
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

By_____
Leo Greenfield